IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

J. F. LAY, ET AL.
Plaintiffs in Error,

v.

E. G. LAY, ET AL.
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTIONS TO DISMISS OR AFFIRM.

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J. F. LAY, ET AL.
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vs. No.633.

R. C. LAY, ET AL.
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

I.

STATEMENT OF CASE.

In this statement chronological order will conduce to clearness and logical order.

February 26, 1853, Congress enacted the statute that is now Section 3477 of the Revised Statutes.

During our late Civil War there residede in Scott county, Mississippi, a woman, Nancy Lay, a widow, with two sons, R. M. Lay, Sr., and Jas. G. Lay. The federal

army under General Sherman took some of Nancy Lay's personal property, whereupon there accrued to her a claim against the United States for compensation.

She presented her claim to the Southern Claims Commission in May, 1872, but that tribunal disallowed her claim for the reason that it had become barred by limitation, the time for the presentation of said claim to said tribunal having expired.

Nancy Lay had a grandson, a son of said Jas. G. Lay, R. M. Lay, Jr., now deceased, whose heirs, being among the defendants in error, contend, and the state trial and Supreme Courts found, that, during her lifetime, at least twenty years prior to the allowance of the claim or the issuance of the warrant therefore, she assigned and transferred to said R. M. Lay, Jr., her said claim against the United States. Nancy Lay died intestate in the year 1886, leaving surviving her, as her only legal heirs, her said two sons, R. M. Lay, Sr., and Jas. G. Lay.

On April 11, 1891, the said R. M. Lay, Jr., falsely pretending to be the administrator of Nancy Lay's estate and wholly without any color of right or authority, pretended to make a contract with George A. King, one of the defendants in error, an attorney, to prosecute said claim against the United States for a fee of fifty per centum of the amount recovered, to which the said R. M. Lay, Jr., made oath that the said Nancy Lay, decedent, was the "owner of the claim." And, on January 31, 1900, the same said R. M. Lay, Jr., again falsely pretending to be the administrator of Nancy Lay's estate and wholly without any color of right or authority, pretended to make a contract with George A. King and William B. King, attorneys, among the defendants in error, to prosecute said claim for a fee of fifty per centum of any amount recovered. Presumably, but surely and so treated by the attorneys, defendants in error, through-

out this litigation, the said second so-called fee-contract was in lieu of the said first so-called fee-contract, or the first was merged into the second; yet it will be specially noted that each and both of the so-called fee-contracts were attempted to be made before the said R. M. Lay, Jr., had been appointed or qualified as administrator of Nancy Lay's estate.

The said claim of Nancy Lay's estate was presented to the Fifty-Sixth Congress; and, by resolution of the Senate thereof, the said claim was, on February 4, 1901, referred to the Court of Claims for a finding and adjudication of the facts in accordance with Section One of an Act approved March 3, 1887, entitled "An Act to provide for the bringing of suits against the Government."

On March 4, 1901, her said grandson, R. M. Lay, Jr., was, by the chancery court of said Scott county, Mississippi, appointed the administrator of Nancy Lay's estate, after which no fee-contract was made, or attempted to be made, with any of said attorneys, among the defendants in error, by any one in any capacity whatever.

In and before said Court of Claims, under the said Senate reference thereto, the said R. M. Lay, Jr., as administrator of Nancy Lay's estate, filed and presented his petition against the United States in behalf of his decedent, Nancy Lay, as claimant, alleging, among other things, that he, the said R. M. Lay, Jr., was the administrator of Nancy Lay's estate, by appointment of the chancery court of Scott county, Mississippi, on March 4, 1901; "that the claimant (Nancy Lay's estate) is the sole owner of this claim and the only person interested therein; that no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; that the claimant (Nancy Lay's estate) is justly entitled to the amount herein claimed from the United States."

In the year 1905 the said R. M. Lay, Sr., son of Nancy

Lay, deceased, died, validly testate, devising all his estate, real and personal, to plaintiffs in error; and in the year 1907 the said Jas. G. Lay, son of Nancy Lay, deceased, died, validly testate, also devising all his estate, real and personal, to the plaintiffs in error.

On February 18, 1907, the said case of Nancy Lay's estate against the United States was brought to a final hearing on its merits before said Court of Claims and the Court, upon the said petition and the evidence and hearing, finally found and adjudged, on February 25, 1907, that Nancy Lay was loyal and that the value of her property taken by the United States Army was $2,804.

In the year 1908 the said R. M. Lay, Jr., died intestate; and his son, R. C. Lay, one of the defendants in error, was duly appointed administrator de bonis non of the estate of Nancy Lay, deceased, as successor of his said father as her administrator. Neither the said R. M. Lay, Jr., either as de facto or de jure administrator of Nancy Lay's estate, nor R. C. Lay, as administrator de bonis non of Nancy Lay's estate, ever made any fee-contract with any of the attorneys among the defendants in error.

The said finding and adjudication of the facts by the Court of Claims having been duly reported to the Congress, an appropriation was made by Act of Congress of March 4, 1915, in payment of said claim in favor of Nancy Lay's estate and further providing as follows:

> "Sec. 4. That no part of the amount of any item appropriated in this bill, in excess of twenty per centum thereof, shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.
>
> "It shall be unlawful for any agent or agents,

> attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall de deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1000."

Shortly thereafter a treasury warrant, for the said sum allowed by the Court of Claims to Nancy Lay's estate and appropriated by Congress, was issued and paid to said R. C. Lay, as administrator de bonis non of Nancy Lay's estate, less twenty per centum thereof which was paid to the attorneys among the defendants in error. Having received the proceeds of the claim, the administrator de bonis non of Nancy Lay's estate indicated no intention of accounting therefor and distributing the same. Section 2137 of Mississippi Code of 1906, in material part, provides:

> "Any person entitled to a distributive share of an intestate's estate....may, at any time after the expiration of twelve months from the grant of letters....of administration, petition the court therefor, setting forth his claim; and the administrator....and all persons interested as distributees....shall be cited to appear."

Thereupon, to the March term, 1916, of the chancery court of said Scott county, Mississippi, the plaintiffs in error, as the only persons "entitled to the distributive shares" of Nancy Lay's intestate estate, being the sole devisees under the wills of Nancy Lay's only two sons or heirs and distributees, petitioned the court therefor, setting forth their claim or title to said claim of Nancy

Lay's estate and its proceeds by operation of the law of descent and distribution from Nancy Lay, deceased, intestate, to her said two sons as her only heirs and distributees and from her said two sons, under their wills, to plaintiffs in error, as devisees thereunder, and making the defendants in error parties thereto, and praying, among other things, that the administrator de bonis non account for and distribute the proceeds of the claim of Nancy Lay's estate ,that the heirs of said R. M. Lay, Jr., deceased, propound their claim, if any they had, and that the attorneys, among the defendants in error, do likewise, answer under oath being waived, and that, if any claims were propounded, they be disallowed. In response to said petition or bill of complaint the said administrator de bonis non of the estate of Nancy Lay, deceased, filed his first and final account, as such administrator, reciting the collection and receipt by him, as such administrator, from the United States of the sum of $2,243.20 on the said claim of his decedent, Nancy Lay, against the United States, twenty per centum of the amount ($2,804.) appropriated in payment of the claim, as allowed by the Court of Claims, having been paid to and accepted by George A. King, William B. King and Paul Johnson, attorneys, in accordance with the provisions of Section 4 of the said Act of appropriation, and that the said proceeds of said claim constituted all of the estate of Nancy Lay, deceased; and the said administrator de bonis non refers to the so-called fee-contracts of the attorneys and to the claim of the plaintiffs in error and prays the plaintiffs in error and said attorneys be made parties to the administration of said estate and that therein they propound their respective claims to the said proceeds of the said claim of Nancy Lay's estate and that he, as such administrator, be directed by the court as to the proper distribution thereof. And the heirs of R. M. Lay, Jr., deceased, the said grandson of Nancy Lay and the first or original administrator of her estate, said heirs being among the defendants in error, filed their

answer and cross-bill to the bill of complaint of plaintiffs in error, setting forth that, during her life time, the said Nancy Lay "assigned said claim against the Government to her grandson, R. M. Lay, Jr."; and they pray in their cross-bill, which does not waive answer under oath, that the claim of plaintiffs in error to the proceeds of said claim of Nancy Lay's estate be disallowed; that they, as the heirs of R. M. Lay, Jr., deceased, be decreed said proceeds by the alleged virtue of the assignment to R. M. Lay, Jr., by Nancy Lay in her lifetime of her said claim against the United States; "and that this court decide and decree whether or not the said attorneys (George A. King, William B. King and Paul Johnson, among the defendants in error) are entitled to the additional 30 per centum of said collection." To the legal sufficiency of the answer of the heirs of R. M. Lay, Jr., deceased, the plaintiffs in error filed exceptions; and to the cross-bill of the heirs of R. M. Lay, Jr., deceased, the plaintiffs in error filed an answer under oath denying the fact, and any legal or equitable effect, of the assignment of the said claim from Nancy Lay to R. M. Lay, Jr. In, and as a part of, said proceedings in the chancery court of Scott county, Mississippi, the attorneys, George A. King, William B. King and Paul Johnson, presented their claim for an additional thirty per centum of said proceeds, by the supposed virtue of the said two so-called fee-contracts, setting out said Section 4 of said appropriating Act of March 4, 1915, exhibiting with their petition copies of said so-called fee-contracts and also a duly authenticated copy of the said Senate reference to, and the proceedings and judgment of, the Court of Claims on the claim of Nancy Lay's estate against the United States. To this claim and petition of the attorneys for an additional thirty per centum of the said proceeds the plaintiffs in error, as the only lawful heirs of Nancy Lay and as the only lawful distributees and beneficiaries of her estate, filed and presented, without question or objection, their contest of and objection to the allowance

of any additional fees to the attorneys out of the said proceeds or estate of Nancy Lay, deceased, on the grounds that a reasonable fee had already been paid to them; that any additional fee would be unreasonable and in violation of said Section 4 of the Act of Congress of March 4, 1915; and that the so-called fee-contracts sued on were not binding on the estate of Nancy Lay, deceased.

On the said issues thus joined the cause went to final hearing before the chancellor of the original state court, both on depositions and oral testimony. When all the evidence was in and all the parties had rested or submitted the cause for final decree, the plaintiffs in error moved the chancellor for a final decree in their favor on the grounds that the pretended assignment or transfer of the claim of Nancy Lay against the United States to R. M. Lay, Jr., under which his heirs claim against plaintiffs in error, is null and void and contrary to Section 3477 of the Revised Statutes; that the allowance of additional fees to the attorneys was prohibited and made a crime by Section 4 of the Act of Congress of March 4, 1915, and also urged that the heirs of R. M. Lay, Jr., were estopped and concluded by the conduct of the administrator and by the final judgment of the Court of Claims adjudging the claim in question to belong to the estate of Nancy Lay, deceased. And the learned chancellor finally decreed in favor of the plaintiffs in error, as shown by the record.

Thereupon, the defendants in error appealed to the Supreme Court of Mississippi, which court, reversed and annulled the decree of the lower court and there entered a final decree in favor of the defendants in error, as shown by the reported opinion, pages 10 to 17, inclusive, of brief for defendants in error, and the judgment in the record. Whereupon, the plaintiffs in error petitioned for and obtained a writ of error to this Court, and assigned errors as appear in the assignment thereof in the record. And the defendants in error now move this Court either to dis-

miss the writ of error for want of jurisdiction in this Court, or to affirm the decree of the State Supreme Court on the ground of the frivolousness of the federal questions involved.

We submit the foregoing as an accurate and comprehensive statement of the case, and supplement the same by the following agreement:

AGREED STATEMENT OF FACTS.

Supplementing the portions of the record, printed and submitted by the defendants in error for the purposes of their motions to dismiss or affirm, and in adjustment of controversies as to the record facts appearing in the statements thereof by the parties in their respective briefs, it is, therefore, agreed as follows:

1. That Nancy Lay died intestate in the year 1886.

2. That R. M. Lay, Jr., was appointed administrator of Nancy Lay's estate by the chancery court of Scott county, Mississippi, on March 4, 1901.

3. That Nancy Lay left surviving her, as her only heirs, her two sons, R. M. Lay, Sr., and Jas. G. Lay.

4. That neither R. M. Lay, Jr., nor his heirs are heirs of Nancy Lay, or distributees of her estate, as such.

5. That the proceeds of her said war claim were all of the property claimed by her estate in closing the administration thereof.

6. That the record does not show, nor tend to show, that the heirs of R. M. Lay, Jr., or the administrator de bonis non of Nancy Lay's estate, invited either of the state courts to allow the thirty per centum additional fees to

the attorneys, George A. King, William B. King and Paul Johnson; and that none of the defendants in error in anywise attempted to waive any objection, if any they had, to the allowance of such fees. The record further shows that defendants in error made no objection, at any time in the record to allowance of the additional 30% attorneys' fees.

7. That R. C. Lay was appointed administrator de bonis non of Nancy Lay's estate in the year 1908; and that he never executed or renewed either of the fee-contracts sued on by the attorneys above.

8. That where there is any other variance in the material facts, as between the statements thereof by the defendants in error and the plaintiffs in error in their respective briefs, the statement thereof by the plaintiffs in error shall control for the purposes of the motions to dismiss or affirm.

Agreed this October 19, 1918.

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Attorney for Defendants in Error.

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Attorneys for Plaintiffs in Error.

MOTIONS TO DISMISS OR AFFIRM.

I.

MOTION TO DISMISS.

The first error assigned is that

> "The Supreme Court of Mississippi erred in holding and deciding: That the voluntary assignment of a claim against the United States, prior to the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, was valid and effective, notwithstanding the provisions of Section 3477 of Revised Statutes of the United States, the appellees (plaintiffs in error) contending that such assignment was null and void under said Section of the Revised Statutes."

We submit that in holding the oral, voluntary assignment in the case at bar to be valid and effective, contrary to the plain and mandatory provisions of Section 3477 of the Revised Statutes, and especially in view of the controlling force of the many, late, plain and unanimous decisions of this Court, Spofford v. Kirk, 97 U. S. 484, 24 L. Ed., 1032; Nutt v. Knut, 200 U. S. 12, 50 L. Ed., 348; and National Bank of Commerce v. Downie, 218 U. S. 345, 54 L. Ed., 1065, is tantamount to a "decision against the validity" of the statute, as contemplated in the first paragraph of Section 237 of the Judicial Code as amended September 6, 1916, with reference to writs of error. In view of the unmistakable terms of Section 3477, "too plain," as said by this Court "to need construction," and especially in view of the repeated application of the statute by this Court to cases exactly like the case at bar, no pretense of reasonable room is left for state courts to exercise themselves in so-called construction of

the statute; and to ignore its plain mandates and the decisions of this Court is to decide "against its validity" under the guise or name of so-called construction. However this may be, this question or assignment of error is most certainly brought within the jurisdiction of this Court by its unquestionable jurisdiction of the second and especially of the third questions or assignment of errors, which are treated hereinafter.

The second assignment of error is that

> "The Supreme Court of Mississippi erred in holding and deciding: That the final judgment of the United States Court of Claims, adjudging the claim against the United States and its funds or proceeds, in question in said case, to be the property of the person (Nancy Lay) through whom appellees (plaintiffs in error) claim, had no effect, operation or application in said case, the appellees (plaintiffs in error) claiming in accordance with the said judgment of the Court of Claims and the appellants (defendants in error) to the contrary."

In the suit on this claim by R. M. Lay, Jr., as administrator of the estate of Nancy Lay, deceased, against the United States in the Court of Claims the one, main and all-important fact for finding and adjudication by that court was the title to or ownership of the claim. That the claim was the unassigned property of Nancy Lay's estate was an absolute sine qua non even to the maintenance of the suit and essential to any judgment or relief whatever and was essentially jurisdictional. United States v. Gillis, 95 U. S. 407, 24 L. Ed., 503. In the cited case, one Ryan owned a war claim against the United States; and, even prior to suit thereon, he attempted to assign the legal title thereto to one Gillis, who brought suit thereon in the Court of Claims, which court

erroneously allowed the claim, and the United States appealed to this Court. This Court reversed the judgment of the Court of Claims and dismissed the suit on the sole ground that Section 3477 rendered the assignment null and void. In view of the statute and of the decision of this Court in the Gillis case, supra, the suit of Nancy Lay's administrator against the United States in the Court of Claims was in the nature of a proceeding in rem to establish the ownership and status of the claim; and the final judgment of the Court of Claims, adjudging the claim against the United States, and its funds or proceeds, to be the unassigned property of Nancy Lay's estate, constitutes the law of the case and is conclusive res adjudicata in that and all subsequent proceedings in that and all other courts where the title to the claim or its proceeds comes in question. Section 249, Freeman on Judgments, Fourth Edition. R. M. Lay, Jr., was, and his heirs, among the defendants in error, as his privies, now are, completely estopped both by his conduct as administrator of Nancy Lay's estate, as specially found on the facts by the lower state court, and also by the judgment of the Court of Claims finally adjudging the essential and jurisdictional fact and right that the claim was the unassigned property of Nancy Lay's estate, a judgment rendered at the suit of R. M. Lay, Jr., as administrator of Nancy Lay's estate, and in direct response to his petition, oath and evidence, adduced by him, to that very one end and result.

> "The law of estoppel denies to the personal representative (R. M. Lay, Jr., as administrator), who takes a just possession of property (the claim of Nancy Lay's estate) in his fiduciary capacity (as such administrator), the right subsequently to deny the title of his decedent (Nancy Lay) or set up adverse title to the injury of those beneficially interested" (the plaintiffs in error). 18 Cyc. p. 212, and the many authorities cited.

There seems to be no authority to the contrary of this proposition of law. Therefore, the heirs of R. M. Lay, Jr., among the defendants in error, as privies of their said ancestor, and estopped by the conduct of their ancestor and concluded by the final judgment of the Court of Claims, adjudging the claim and its proceeds to be the unassigned property of Nancy Lay's estate.

Moreover, under Section 1 of Article IV of the Federal Constitution, the said judgment of the United States Court of Claims is entitled to full Faith and Credit in the State Supreme Court in the case at bar. And such judgment of the United States Court of Claims constitutes such "an authority under the United States as, that the decision of the state court against its "validity" or effect in the case at bar, gives this Court jurisdiction to re-examine the same upon writ of error, Crescent City Live-Stock Landing and Slaughter-House Co. et al. v. Butchers' Union Slaughter-House and Live-Stock Landing Co., 120 U. S. 141, 30 L. Ed., 614, in which this Court held:

> "The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the federal courts by proper process."

Within the very letter and spirit of the first paragraph of Section 237 of the Judicial Code as amended September 6, 1916, defining the jurisdiction of this Court upon writs of error, the decision of the State Supreme Court of Mississippi in the case at bar is "A final decree, where is drawn in question the validity of an authority exercised under the United States, and the decision is against its validity, and may be re-examined" in this Court "upon a writ of error." Crescent City Live Stock Co. v. Butchers' Union Slaughter House Co., supra;

Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 59 L. Ed., 1042. Therefore, this Court has jurisdiction, upon the writ of error, of this second federal question or assignment of error. West Side Belt R. Co. v. Pittsburgh Constr. Co., 219 U. S. 92, 55 L. Ed. 107.

The third assignment of error is that

> "The Supreme Court of Mississippi erred in holding and deciding: That Section 4 of the Act of Congress of March 4, 1915, limiting to twenty per centum the amount of fees to be paid attorneys on account of services rendered in connection with the claim against the United States, in question in said case, was invalid and in violation of the Constitution of the United States."

Of this federal question or third assignment of error this Court unquestionably has full and perfect jurisdiction upon the writ of error, within both the technical letter and spirit of the first paragraph of Section 237 of the Judicial Code as amended September 6, 1916, relating to the jurisdiction of this Court upon writs of error. By this assignment of error, in the very language of Section 237 of the Judicial Code as amended, there is properly and legally presented and submitted to be "re-examined" by this Court, "upon a writ of error,

> "A final....decree in a suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a....statute of....the United States, and the decision is against (its) validity."

A case more perfectly and unquestionably clothing this Court with full and complete jurisdiction of re-examination upon a writ of error can not be imagined; and this Court, having jurisdiction of the case or "decree"

on this federal question or assignment of error, thereby acquires full jurisdiction of the other two federal questions or assignments of error in the case at bar, however presented, whether by writ of error or by certiorari, in accordance with the universal rule that where a court, especially of equity, as in the case at bar, acquires jurisdiction of a case for one purpose it necessarily assumes jurisdiction of all questions or for all purposes, that is, of the whole case. Courts, especially of equity, do not take jurisdiction of cases in part or by piecemeal.

This Court will observe and bear in mind that the case at bar was one of exclusive equity jurisdiction in its inception in the original state court, and continued to be such in the Supreme Court of the state, and is the same in this Court. This Court will further note well and bear in mind that the case at bar was and is, in the language of our state Constitution and statutes vesting and defining the full jurisdiction of our state chancery courts, entirely and essentially a "matter of the administration" of Nancy Lay's estate, particularly with reference to the final accounting of her administrator, determining the amount, if any, of attorneys' fees to allow him credit for, and determining the proper and lawful distribution of the estate; and these proceedings were set in motion in response to a suit in the "matter of the administration" by the plaintiffs in error, as the only lawful heirs of Nancy Lay and the only lawful distrubutees of her estate, to compel an accounting and distribution by R. C. Lay, the administrator de bonis non of Nancy Lay's estate. In closing the administration of an estate our state statutes require and provide, in material part, as follows:

> "Sec. 2124. When the estate has been administered by payment of the debts and the collection of the assets, it shall be the duty of the....administrator,....to make and file a final settlement of

the administration, by making out and presenting to the court, under oath, his final account....."

"Sec. 2125. The....administrator shall file with his final account a written statement, under oath, of the names of the heirs...of the estate...."

"Sec. 2126. And the final account so presented, with the statement as to parties, shall remain on file, subject to the inspection of any person interested; and summons shall be issued or publication be made for all parties interested, as in other suits in the chancery court, to appear...., and show cause, if any they can, why the final account ....of the administrator should not be allowed and approved."

"Sec. 2127. ...the court shall examine the final account so presented and filed, hear the evidence in support of it, and the objections and evidence against it. If the court shall be satisfied that the account is correct....it shall make a final decree of approval and allowance, and shall, at the same time, order the....administrator to make distribution of the property in his hands."

"Sec. 2131. In annual and final settlements, the....administrator shall be entitled to credit for such reasonable sums as he may have **paid** for the services of an attorney in the management or in behalf of the estate if the court be of opinion that the services were proper and rendered in good faith."

In compliance with the above quoted state statutes the plaintiffs in error, as the only lawful heirs of Nancy Lay and as the only lawful distributees of her estate, were made parties to the matter of the administration of her estate; and, as such only lawful heirs and distributees of her estate, the plaintiffs in error presented their claim, right and title to the proceeds of the said war claim of Nancy Lay's estate. And, as aforesaid, the at-

torneys, George A. King, William B. King and Paul Johnson, among the defendants in error, filed and presented against her estate their claim for thirty per centum additional fees; and the administrator de bonis non very properly prayed for the directions of the court as to the lawful distribution of said proceeds, including the question as to whether or not the additional thirty per centum in fees should be allowed and paid to said attorneys. Section 2108 of our state Code provides, in material part, as follows:

> "The....administrator, legatee, heir, or any creditor, may contest a claim presented against the estate...."

By virtue of their right under the above statute, as the only lawful heirs of Nancy Lay, deceased, as well as by virtue of their right under the general law and premises, the plaintiffs in error, as the only heirs of Nancy Lay and as the only distributees and beneficiaries of her estate and of the proceeds of her said war claim, contested the said claim for additional fees of thirty per centum of the proceeds of Nancy Lay's said war claim, contesting and objecting to the allowance or payment of any additional fees, out of the proceeds arising from Nancy Lay's said war claim and now belonging to her estate and to the plaintiffs in error as the only lawful distributees thereof, on the ground, among others, that such allowance and payment of additional fees was prohibited and made a misdemeanor by said Section 4 of the Act of Congress of March 4, 1915, appropriating the money for the payment of the said claim of Nancy Lay's estate. The original state court disallowed the attorney's claim, holding said Section 4 of the Act of March 4, 1915, valid and effectual; but the state supreme court allowed the attorneys' claim, holding said Section 4 invalid as contrary to the Constitution of the United States, "where is drawn in question the validity of the statute of the

United States, and the decision is against its validity." Sec. 237 of Judicial Code as amended September 6, 1916. Of this federal question or assignment of error this Court has full and unquestionable jurisdiction upon the writ of error. Plaintiffs in error, as the only heirs of Nancy Lay, deceased, and as the only lawful distributees or beneficiaries of her estate and of the proceeds of her said war claim, had just as perfect a legal and equitable right to contest and resist the diversion of thirty per centum of the proceeds to the attorneys as they had to contest and resist the diversion and distribution of the whole fund to the heirs of R. M. Lay, Jr., deceased, under the null and void assignment. The two legal and equitable rights of the plaintiffs in error are distinct, independent, coordinate and cosqual.

In demonstration of this position we have but to point out by the record that the case at bar is fundamentally and essentially a matter of closing the administration of Nancy Lay's estate. Both the original and the succeeding administrators of her estate treated and recognized the said war claim and its proceeds as belonging alone to her estate; the Court of Claims conclusively adjudged the jurisdictional fact that the claim was the unassigned property of her estate; the Congress made the appropriation in payment of the claim in favor of her estate; the Government issued and paid its warrant to her estate in the settlement of her claim; and in the case at bar, all of the parties thereto, in their pleadings and evidence, and the lower state court and the state supreme court, in their respective final decrees, treated and recognized the claim and its proceeds as an asset and the property of her estate, allowing the administrator of her estate his commissions and attorney's fees out of the proceeds; and the state supreme court enforced the so-called fee-contracts, alleged to have been made by the administrator of her estate, and ordered the administrator of her estate, as such, to pay the additional fees of thirty per

centum out of her estate. Moreover and conclusively, the attorneys, William B. King, George A. King and Paul Johnson, among the defendants in error, presented their said claim for the additional fees of thirty per centum against the estate of Nancy Lay, deceased, as such, and not otherwise nor against any other person; and the said attorneys presented their said claim alone against the estate of Nancy Lay, deceased, independently of, and in real and fundamental conflict with, the alleged assignment of the claim by Nancy Lay to R. M. Lay, Jr. No other true or record view of the case at bar is possible. Such, then, being the only and true nature of the case, precisely so treated and considered by every fiduciary, court, official or party that has in anywise touched the matter, therefore, the plaintiffs in error, as the sole heirs of Nancy Lay, deceased, and the sole distributees and beneficiaries of her estate, were and are the only persons who could or can lawfully contest the allowance of the additional fees of thirty per centum of the proceeds, claimed against the estate alone by the alleged virtue of a so-called fee-contract with the administrator of her estate. Therefore, the lawful right, vested exclusively in the plaintiffs in error, to contest the allowance of the additional attorney's fees for representing the estate in recovering on its claim, is a right really and essentially independent of any other question in the case at bar; and, therefore, this Court has full and complete jurisdiction of the third federal question or assignment of error, independently of, and as one of the coequal and coordinate questions with, the other federal questions in the case at bar. When this Court is reached for the re-examination of a case, the only and essential nature of the case, as treated and considered by all parties and the courts, can not be radically and fundamentally changed in order to question or affect the jurisdiction of this Court of the case. The state supreme court did not render, and could not have rendered, the decree it did render without deciding against the validity of section 4.

At page 45 of their brief defendants in error say:

> "The defendants in error in this case invited the state court to allow the fee of fifty per cent.... and the defendants in error do not desire in any court to question the payment thereof."

The accuracy of the quoted statement as of a fact of record is totally disproved and its effect, if any, if it were correct, is wholly eliminated by the "Agreed Statement of Facts" hereinabove set out. The defendants in error, not being among the lawful heirs of Nancy Lay nor among the lawful distributees of her estate, have no possible pretense of legal or equitable right or authority either to approve or disapprove of the amount of attorney's fees to be credited to the administrator de bonis non of Nancy Lay's estate, or to be paid to the attorneys. Such right is vested solely in the plaintiffs in error, as the only heirs of Nancy Lay and as the only lawful distributees of her estate, that is, of the proceeds of her said war claim. And no person or court can waive the provisions of said Section 4, which make it a misdemeanor to allow, pay or receive any additional fees.

But the defendants in error contend that, if this Court should hold that Section 3477 of Revised Statutes is inapplicable to the case at bar, then this Court would have no occasion to decide the question as to additional fees for the attorneys. This contention is untenable, in the present inquiry into this Court's jurisdiction of the entire case or decree at bar. Their contention merely and purely begs one of the main questions in the case, that is, as to the legal title to the war claim and proceeds as between the heirs of R. M. Lay, Jr., deceased, the assignee under the null and void assignment of the war claim, and the plaintiffs in error, claiming the proceeds of Nancy Lay's war claim by operation of the law of descent and distribution from Nancy Lay, intestate, to her

said two sons, as her sole heirs, and from her said two sons to plaintiffs in error as the sole devisees under the lawful wills of her said two sons.

As said lately by this Court, in Bates v. Bodie, 245 U. S. R. 520, in denying a motion to dismiss a writ of error on a similar ground,

> "But this is the question in controversy. The decision of the Supreme Court of Nebraska is challenged for not according to the decree the credit it is entitled to and it is no answer to the challenge to say that the Supreme Court committed no error in responding to it and that, therefore, there is no federal question for review. Andrews v. Andrews, 188 U. S. 14. The motion to dismiss is denied."

The fatal defect in their contention is that it entirely overlooks the all-important fact that the decision of the State Supreme Court as to Section 3477 of the Revised Statutes presents a federal question and is assigned as error, and of which this Court has jurisdiction by the full virtue of its unquestionable jurisdiction of the second and especially of the third assignments of error. And, moreover and conclusively, the question as to the right to the additonal attorneys' fees was one of the main, independent, coequal and coordinate questions in the case.

But, if we correctly conceive their position, the defendants in error further contend that, if the federal question in the first assignment of error, as to Section 3477 of the Revised Statutes, is not re-examinable by this Court upon the writ of error, but only by certiorari, then, although this Court may have the jurisdiction to re-examine the federal question in the decision against the validity of Section 4 of the appropriating Act of March 4, 1915, presented in the third assignment of error prop-

erly upon the writ of error, still this Court would not have jurisdiction to re-examine the first assignment of error, as to Section 3477, because not presented by certiorari. In other words, their contention is that, if in one and same case there are two classes of federal questions or errors assigned, the one re-examinable upon a writ of error and the other reviewable by certiorari, both the processes must be obtained in one and the same case in order for this Court to acquire jurisdiction of both classes of federal questions, that is, that the jurisdiction of this Court of one and the same case on the one class of federal questions will not draw to its jurisdiction the other class of federal questions; but that in the one and the same case both processes, writ of error and certiorari, must be sued out, and thereby, in the one and the same case, have two separate and distinct processes, records, sets of briefs, hearings et cetera, that is, make two distinct and independent cases out of one and the same case, with the possible or conceivable situation of two different and conflicting judgments in one and the same case, if no consolidation was made. We submit that, by Section 237 of the Judicial Code as amended September 6, 1916, Congress never intended to create such utter, expensive and troublesome confusion and overthrow so many fundamental principles of jurisprudence, especially of equity jurisprudence. The case at bar being one of equity jurisprudence, and this particular inquiry being one of equity jurisdiction, we invoke the operation of the general principle, which needs no citation of authority that a court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter. McGowan v. Parish, 237 U. S. 285, 59 L. Ed., 955. We also invoke the maxim that "equity delights to do justice and not by halves." Equity also prevents a multipicity of suits. Section 237 of the Judicial Code as amended most beneficently and unquestion-

ably contemplates the bringing to this Court for re-examination or review, in proper cases, the entire "final judgment or decree" of state courts by one proper process or proceeding, and not the bringing to this Court of the different classes of federal questions, affecting one and the same "final judgment or decree," by two or more different and distinct processes or proceedings. The right of re-examination or review is from the entire "final judgment or decree," as affected by the nature of the decision of the federal questions upon which it rests, and not from the class or nature of the federal questions. When this Court has jurisdiction of a case on account of one or a particular federal question involved, the thing that it has jurisdiction of is the entire case, that is, the entire "final judgment or decree" in the case, as affected by all federal questions which erroneously affect such "final judgment or decree" and which have been competently raised and saved and assigned as error. Therefore, this Court in the case at bar has full and complete jurisdiction of each and all of the three assignments of error in this case. McGowan v. Parish, 237 U. S. 285, 59 L. Ed., 955.

We shall not discuss the question as to the validity or constitutionality of said Section 4 of the appropriating Act of March 4, 1915, against the validity of which the state supreme court decided, further than to observe that such discussion, inasmuch as it is of first impression in this Court and is on the merits of the case, should be reserved for hearing on the merits, and not on this motion. Bohanan v. Nebraska, 118 U. S. 231, 30 L. Ed., 71; Bates v. Bodie, supra. We remark, however, in passing, that when it is noted that the attorneys, claiming additional fees, did not have and could not have had a legally binding fee-contract with the estate of Nancy Lay, deceased; that the so-called fee-contracts sued on were both executed by R. M. Lay, Jr., under the false pretense of being administrator of Nancy Lay's estate

and prior to his appointment or qualification as such; that even, if the said so-called fee-contracts sued on had been executed by R. M. Lay, Jr., as the lawful administrator of Nancy Lay's estate, such contracts would not bind her estate, for want of legal authority in the administrator so to bind the estate, 18 Cyc. 247-249, Clopton, Adm., vs. Gholsom, 53 Miss. 466, Hines vs. Potts, 56 Miss., 346; that, therefore, the attorneys had no contract rights or obligations to be impaired by Section 4 of the appropriating Act of March 4, 1915; that Nancy Lay's claim had once become barred and lost by limitation; and that her claim was by an act of free grace of Congress, a gratuity, restored and paid; from these and other considerations it clearly appears that Congress had the constitutional right to make the appropriation on the condition, or to attach the provision, of Section 4 of the Act and that Section 4 is not possibly unconstitutional.

Therefore, this Court has full and complete jurisdiction of all three of the federal questions or assignments of error in the case at bar, and the motion to dismiss should be denied. In Home For Incurables v. City of New York, 187 U. S. 155, 47 L. Ed., 117, this Court said:

> "Later cases in this Court have expressed the additional thought that if the highest court of the state assumes that the record sufficiently presents a question of federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself to sustain the judgment, independently of any question of federal right."

The most cursory inspection of the opinion of the State Supreme Court in the case at bar demonstrates that the State Supreme Court assumed that all three of the

federal questions or assignments of error were sufficiently presented and decided against plaintiffs in error on all of them, wherefore, this Court "will look no further, and will proceed to a consideration of those questions." Rogers v. Hennepin County, 240 U. S. 184, 60 L. Ed. 594.

II.

MOTION TO AFFIRM.

Defendants in error also move this Court to affirm on the ground that the federal questions involved "are so frivolous as not to need further argument." May we borrow the language of the defendants in error to reply that the ground of their motion is "so frivolous as not to need further argument?" Under the above head, defendants in error contend that Section 3477 of the Revised Statutes has no application to the case at bar. This contention, in the language of this Court in a different case, "is so absolutely devoid of merit as to be frivolous, and has been so explicitly foreclosed by decisions of this Court as to leave no room for real controversy." We shall very briefly comment on the cases cited by defendants in error.

The first case cited, and especially relied upon, is York v. Conde (N. Y.) 42 N. E. 193. The opinion of the New York court on the construction and application of the statute is of no authority in the case at bar; if so, under the controlling force of subsequent decisions of this Court, National Bank of Commerce v. Downie, supra, the New York court explicitly and completely overruled its decision in the cited case by its late case of Manhattan Commercial Co. v. Paul, 111 N. E. R. 76.

The case next cited is Conde v. York, 168 U. S. 642, 42 L. Ed. 611. What this Court said in the cited case on the construction and application of Section 3477 is of no

authority, because this Court held that it had no jurisdiction of the case, neither party claiming any right under Section 3477. See Nutt v. Knut, 200 U. S. 12, 50 L. Ed. 348.

The cited case of Goodman v. Niblack, 102 U. S. 556, 26 L. Ed., 229, is not in point for defendants in error, the case holding, as is contended for by plaintiffs in error by inheritance and devise, that the assignment of a claim against the United States, merely by operation of law as an incident of a general assignment for the benefit of creditors, is not prohibited by the statute. The statute prohibits the voluntary assignment of claims.

The cited case of Hobbs v. McLean, 117 U. S. 567, 29 L. Ed. 940, is not in point for the very patent reason that this court held that articles of partnership entered into before, and only in contemplation of, a contract with the Government was, of course, not an assignment of any claim against the government, because then no contract with, or claim against, the government existed.

The cited case of Bailey v. United States, 109 U. S. 430, 27 L. Ed. 988, is not in point, for the all-sufficient reason that this Court explicitly held:

> "In the case before us no question arises as to the transfer or assignment of a claim against the government."

In printing the brief of defendants in error their printer in error substituted the article "the" for the word "no" in the above quotation.

The cited case of Price v. Forrest, 173 U. S. 410, 43 L. Ed. 749, has no application, because it is another case of an assignment merely by operation of law, as distinguished from a voluntary assignment by act of a person.

The cited case of McGowan v. Parish, 237 U. S. 285, 59 L. Ed. 955, is not in point because this Court held that the "consent decree" constituted a waiver of the question as to the effect of the statute. The case of Portuguese American Bank v. Wells, 242 U. S. 7, 61 L. Ed. 116, does not involve the statute. We shall not comment on their citations of a few state court decisions, for the reason that state decisions are of no authority whatever in the construction or application of the federal statute.

Now in utter rout of the defendants in error as to the construction and application of Section 3477 we cite the statute and the following decisions of this Court thereon: Spofford v. Kirk, 97 U. S. 484, 24 L. Ed. 1032; Nutt v. Knut, 200 U. S. 12, 50 L. Ed. 348; and National Bank of Commerce v. Downie, 218 U. S. 345, 54 L. Ed. 1065 These three cases foreclose any further question but that Section 3477 rendered absolutely null and void the assignment under which the defendants in error claim the proceeds of Nancy Lay's war claim against the United States. In fact the citation of the Bank-Downie case, supra, decided in November, 1910, is sufficient, as it exhaustively reviews and approves the Gillis, the Spofford-Kirk and the Nutt-Knut cases, supra, as the only decisions of this Court on the precise point at issue in the case at bar.

In the Spofford-Kirk case, supra, Kirk, having a claim against the United States, drew, before its allowance, two orders for $600, each on his attorneys, payable out of the funds to come into their hands from the allowance and payment of the claim, one order in favor J. S. Wharton and the other in favor of E. R. Taylor, both of which orders were accepted by the drawees, attorneys, payable out of any monies coming into their hands from the United States from the allowance and payment of the claim of Kirk. The two accepted and endorsed orders were, about a month after their dates, offered for sale to Spofford, who, on the assurance that Kirk's claim had been allowed, became the assignee or holder of both orders

for value, and in entire good faith. Subsequently, Kirk, in a letter to his attorneys, recognized the orders as valid. But after the issuance of the treasury warrant, he refused to indorse the warrant or admit the validity of the orders. Thereupon, Spofford filed a bill in the Supreme Court of the District to compel the payment of the orders from the proceeds of the claim. The bill was dismissed on account of Section 3477, and, for the same, sole reason, the decision was by this Court affirmed. It will be specially noted that the dates of the orders and their acceptance were prior to the allowance of the claim, and that the assignment of the orders to Spofford was after the allowance of the claim by the Government, and that the controversy in court over the proceeds of the claim arose after the allowance of the claim by the Government and after the issuance of the warrant. The United States was not a party to the Spofford-Kirk case, had not the remotest interest in it and had allowed the claim and issued its warrant in payment before the controversy between Spofford and Kirk in court ever arose. The Spofford-Kirk case in material fact or in principle can not be distinguished from the case at bar; and, if Spofford's rights and strong equities as an innocent purchaser after the allowance of the claim could avail him nothing on account of Section 3477, then what shadow of right can the heirs of R. M. Lay, Jr., have to claim the proceeds of Nancy Lay's claim by a null and void assignment, a voluntary assignment, made, if made at all, nearly a quarter of a century before the allowance of the claim or the issuance of the warrant!

The case of Nutt v. Knut, supra, was a suit by an attorney on a fee-contract, similar in terms and provisions to those in the case at bar, against the estate of a deceased claimant against the United States. The fee-contract sued on was executed before the allowance of the claim; but the suit thereon was begun after the allowance and payment of the claim. The validity of the fee-contract was assailed on the ground that it violated

Section 3477 in that it attempted to give a lien on the claim or its proceeds prior to its allowance. Our state supreme court erroneously held the fee-contract valid on its face, notwithstanding Section 3477. This Court took jurisdiction upon a writ of error, and pointed out our state court's plain error in holding the fee-contract valid on its face, and this Court held the fee-contract void on its face insofar as it attempted to create a lien on the claim or its proceeds prior to its allowance, as in violation of Section 3477. The United States was not a party to the suit, was not in the remotest way interested in the suit and had allowed the claim, issued its warrant and paid it long before the controversy arose in the courts over the attorney's fees. The very same contentions that are now made by the defendants in error as to Section 3477 were expressly urged before this Court in the Nutt case, but so vainly and groundlessly as not to merit or receive any response to the point from this Court.

The case of National Bank of Commerce v. Downie, supra, is the latest and final word from this Court on the point at issue. It was a case where a firm, which afterward became bankrupt, had some unallowed claims against the United States which unallowed claims the firm attempted to assign to certain banks as collateral security for loans of money. Thereafter the assignor-firm became bankrupt and the suit arose over the title to the proceeds of claims against the United States as between the trustee in bankruptcy and the banks as assignees of the claims before their allowance. In its decision of the case on Section 3477 this Court reviewed and approved the Gillis case, the Spofford-Kirk case and the Nutt-Knut case, supra, quoting freely from each of them, and of the Spofford-Kirk case saying that it is "frequently referred to in later decisions and always followed." And this Court concludes its final and exhaustive review of the point in the case at bar by saying:

"The present cases are not assignments which,

by operation of law, created an interest in the assignor's claims against the United States. They are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute. If any regard whatever is to be had to the intention of Congress, as manifested by its words,—too clear, we think, to need construction,—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred..... Any other holding will effect a repeal of the statute by mere judicial construction, in disregard of the plain, unequivocal intent of Congress, as indicated by the statute."

What imaginable rights or equities have the legally and equitably estopped heirs of R. M. Lay, Jr., under a null and void voluntary assignment without consideration as compared or contrasted with the real and superior equities of the innocent purchaser Spofford against his assignor in the Spofford-Kirk case, supra, or those of the innocent Banks, in the Bank-Downie case, supra, which had loaned large sums of money on the assignments as collateral security? Equity follows the law. It is not a question as to when the controversy arises between the assignor and assignee; but the sole question is as to the nature of the assignment and especially as to when the assignmnet was made. Again, the ground of the motion to affirm is "so frivolous as not to need further argument."

Therefore, we respectfully pray and submit that the motions to dismiss or affirm be denied and overruled.

Respectfully submitted,

J. C. Bruton

Wm. R. McKay

Attorneys for Plaintiffs in Error

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 633.

J. F. LAY, ET AL.
Plaintiffs in Error.

v.

R. C. LAY, ET AL.
Defendants in Error.

We have this day received of Wm. I. McKay and John C. Bryson, Attorneys of Record for Plaintiffs in Error, in the above styled cause, copy of brief for the plaintiffs in error on motions to dismiss or affirm.

WILLIAM H. WATKINS,
Attorney for Defendants in Error.

October 19, 1918.

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TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

J. F. LAY, ADMR., ESTATE OF R. M. LAY, DEC'D, AND EXECUTOR, LAST WILL AND TESTAMENT OF JAS. G. LAY, DEC'D, ET AL.,

Plaintiffs in Error,

vs. No.

R. C. LAY, ADMR. ESTATE NANCY LAY, DEC'D, ET AL.,

Defendants in Error.

MOTION TO DISMISS OR AFFIRM.

Now come R. C. Lay, administrator of the estate of Mrs. Nancy Lay, deceased, R. C. Lay, Mrs. M. E. Lay, Mrs. I. A. Stewart and W. W. Lay, defendants in error in the above entitled cause, by their attorneys, and move the court to dismiss the writ of error in this case to the judgment of the Supreme Court of the State of Mississippi, for want of jurisdiction, because:

(1) The plaintiffs in error in this case predicate a reversal of the decree of the Supreme Court of the State of Mississippi upon the ground that a right, privilege, or immunity was asserted under a statute of the United States, and that the decision of the Supreme Court of the

State of Mississippi was against such right, privilege or immunity. The plaintiffs in error have not secured from this court a writ of certiorari, as provided by Section 237, Judicial Code of the United States, and therefore any such error is not reviewable by this court.

(2) The right, privilege or immunity claimed or asserted by the plaintiffs in error under the Federal statute referred to in the assignment of error of the plaintiffs in error, not having been brought to the attention of the court by writ of certiorari, the question of the constitutionality of the act of Congress limiting attorneys' fees to twenty per cent. of the amount of certain claims appropriated by Congress is not presented, since only the defendants in error are interested therein, and they have invited the Supreme Court of the State of Mississippi to allow the entire fee of fifty per cent.

(3) No Federal question is raised or presented by the record. If any Federal questions are presented in the record, they are wholly formal, and so absolutely devoid of merit as to be frivolous, and have been so explicitly foreclosed by the decisions of this court as to leave no room for controversy.

(4) If the writ of error shall not be dismissed for want of jurisdiction, defendants in error move that the said judgment of the Supreme Court of the State of Mississippi be affirmed on the ground that although in the opinion of this Court the record may show that this Court has jurisdiction, it is manifest that said writ of error was taken for delay only, and the questions upon which the decision of the cause here depends are so frivolous as not to need further argument.

Rule 6, Subdivision 5.

Attorneys for the Defendants in Error for the Purposes of these Motions.

NOTICE OF MOTIONS.

To the Plaintiffs in ERROR, and Wm. I. McKay of Vicksburg, Mississippi, Attorney of Record for Plaintiffs in Error:

You, and each of you, are hereby notified that the defendants in error, above mentioned, in the foregoing cause, will, on Monday, the day of October, 1918, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for consideration of the Court the foregoing motions, and each of them, and brief thereon, including portions of the record hereto attached and served upon you herewith.

Attorneys for Defendants in Error for the Purposes of These Motions.

STATEMENT OF FACTS.

The essential facts of this case appear in the opinion of the Supreme Court of the State of Mississippi, reported Lay v. Lay, 79 Sou., page 291. Reference to this opinion is now made in aid of the statement of facts contained herein, the opinion itself being made a part of this record.

During the late civil war between the states, Mrs. Nancy Lay was a resident of Scott County, Mississippi, and was the owner of very valuable property, both real and personal. General Sherman, in his march on Vicksburg, demonstrating that war is hell, passed through the property of Mrs. Lay, destroyed and took away cotton and other personal property of great value.

After the surrender, Mrs. Lay, having been a loyal citizen of the United States during the war, propounded her claim against the United States Government for the destruction of her personal property. Her claim was filed, and it was found that the proper presentation of the claim would require an outlay of some money as well as the investment of considerable time and attention. Mrs. Lay had living with her in her home a relative by name of R. M. Lay, Jr. She stated to him that he might prosecute her claim against the United States Government in her name, provided he would bear the necessary expense and give the case the time essential to its proper presentation; and in the event that anything should be recovered, he should have the benefit of the fruits of the recovery.

R. M. Lay, Jr., who was then a boy, not over nineteen years of age, undertook the collection of the claim in the name of his grandmother, Mrs. Nancy Lay, and she turned over to him her papers and documents, and other evidence of the justice of her cause; and, in her lifetime, with her full knowledge and consent, and with the full knowledge and consent of those under whom the plaintiffs in error claim, R. M. Lay, Jr., in the name of his

grandmother, Mrs. Nancy Lay, and under the agreement hereinbefore set out, undertook the collection of the claim, providing out of his own funds the necessary expense incident thereto, and devoting thereto such attention as was required for gatthering testimony and other legitimate purposes.

Mrs. Nancy Lay died about the year 1866, and R. M. Lay, Jr., qualified as administrator upon her estate, and as such administrator continued the prosecution of the claim in question. As administrator of her estate, he employed in Washington, D. C., a firm of lawyers, Messrs. King & King, agreeing to give them fifty per cent. of such amount as might be recovered, executing as administrator of her estate the usual and customary contract in such cases.

The prosecution of the case before the court of claims in Washington, D. C., in the name of R. M. Lay, Jr., administrator of the estate of Nancy Lay, deceased, resulted in the recovery of a judgment in favor of her estate in the sum of $2,804.00 In the meantime, R. M. Lay, Jr., died, and his son, R. C. Lay, one of the defendants in error in this case, qualified as administrator de bonis non of the estate of Nancy Lay, deceased; and, subsequently, the Congress of the United States made an appropriation to pay the claim in full. Section 4 of the Act of Congress making the appropriation in question contained the following provision:

"That no part of the amount of any item appropriated in this bill in excess of twenty per cent. thereof shall be paid, or delivered to or received by any agent, or agents, attorney, or attorneys on account of services rendered or advances made in connection with said claim."

R. C. Lay, administrator of the estate of Nancy Lay, deceased, collected the sum of $2,804.00 from the United States Government. There was deducted from the payment, however, by the disbursing officer twenty per cent. of the amount of the claim, which was paid to Messrs.

King & King, Attorneys, Washington, D. C. The remainder of the money was, by the United States Government, paid and delivered to R. C. Lay, administrator of the estate of Nancy Lay, deceased, who accepted and received the same as administrator of such estate, and the United States Government divested itself thereby of all interest in the controversy. R. C. Lay, administrator, was appointed administrator of such estate in the Chancery Court of Scott County, Mississippi, received such fund as an ofifcer of the court, and was accountable to it for the proper distribution thereof, and he gave and filed with the court a good and sufficient bond, guaranteeing his fidelity in the application and distribution of the fund.

After R. C. Lay, administrator, collected the fund in question, he announced his intention of distributing the same among the heirs at law of R. M. Lay, Jr., to the exclusion of the heirs and devisees of Nancy Lay, deceased, claiming under the agreement hereinbefore set out, more specifically referred to in the opinion of the Supreme Court of the State of Mississippi.

It appears from the record that Nancy Lay left a last will and testament, and that, unless defendants in error, in a court of equity in the State of Mississippi, were entitled to claim the fund in question, by reason of the contract by and between Nancy Lay and R. M. Lay, Jr., the entire fund passed to the plaintiffs in error.

The defendants in error, that is to say, the heirs at law of R. M. Lay, Jr., were perfectly willing, and it was their desire that fifty per cent. of the claim be paid to the attorneys in Washington City, who had so faithfully and with such fidelity prosecuted the case to a final determination. The plaintiffs in error, however, sought to avail themselves of Section 4 of the Act of Congress, limiting the attorneys' fees to twenty per cent.

Whereupon, the plaintiffs in error in this case exhibited in the Chancery Court of Scott County, Mississippi, their original petition against R. C. Lay, Adminis-

trator of the estate of Mrs. Nancy Lay, deceased, and the heirs and devisees of R. M. Lay, Jr., as well as King & King, Attorneys, asking for an accounting of and from the administrator of the proceeds of such judgment, and praying that the court direct the administrator to make the distribution of said estate, paying to the devisees of Mrs. Nancy Lay, deceased, to the exclusion of the heirs at law of R. M. Lay, the entire fund, and to confine the attorneys, Messrs. King & King, to a fee of twenty per cent.

The defendants in error, R. C. Lay, Admr., and the heirs at law of R. M. Lay, Jr., filed an answer and a cross-bill, in which they elaborately set out the superior right and claim in a court of equity of the State of Mississippi of the heirs of R. M. Lay, Jr., to the fund in question. They alleged the agreement entered into by and between R. M. Lay and Mrs. Nancy Lay, the fact that the said agreement entered into by and between the said R. M. Lay and Mrs. Nancy Lay, with the full knowledge and consent of those persons under whom the plaintiffs in error claim; that is to say, the brothers and sisters of Mrs. Nancy Lay, deceased, the children of such brothers and sisters; and the defendants in error prayed the court for a decree directing that the entire fund, after payment of the attorneys' fee of fifty per cent. to the attorneys in question, be paid to the heirs at law of R. M. Lay, Jr., to the exclusion of the plaintiffs in error, being the persons who would have received the same under the last will and testament of Nancy Lay but for the agreement by and between Nancy Lay and R. M. Lay, Jr., in respect to the collection of the fund.

At the time of the filing of such proceedings, the fund in question, less the twenty per cent. which had been paid to the attorneys, was in the custody of the Chancery Court of Scott County, Mississippi, which had full and complete and exclusive jurisdiction to direct its payment and distribution. The United States was without further interest therein, since it is admitted that it had discharged a perfectly valid and legitimate claim, which had

ripened into a judgment, through the payment and satisfaction thereof, to R. C. Lay, administrator of the estate of Nancy Lay, an officer of the Chancery Court of Scott County, Mississippi.

Messrs. King & King also propounded a claim for that portion of the attorney's fee, thirty per cent., remaining unpaid.

Upon such issues, as above outlined, the cause went to trial in the Chancery Court of Scott County, Mississippi. It being the contention of the plaintiffs in error that the defendants in error had absolutely no interest in the fund in question, because the alleged contract by and between Nancy Lay and R. M. Lay, Jr., was in violation of Section 3477 of the Revised Statutes of the United States, being Section 6383 of the U. S. Comp. Statutes, Ann.

It was the further contention of plaintiffs in error that Messrs. King & King, the attorneys, should be confined to an attorney's fee of twenty per cent., in accordance with the limitation contained in Section 4 of the Act of Congress making appropriation for the allowance of the claim.

It was also denied by the plaintiffs in error that there was any agreement or transfer on the part of Nancy Lay to R. M. Lay, Jr., respecting the claim in question.

At the trial of the case, the presiding judge or chancellor made the following finding of facts:

"After hearing oral argument of counsel, the cause was taken under advisement, and briefs on behalf of all parties were submitted; and it appearing to the court that during the late civil war there accrued to the said Nancy Lay, now deceased, a claim against the United States for the value of certain of her property taken or destroyed by the Union or Federal army; that prior to her death, the said Nancy Lay assigned and transferred her said claim against the United States to her grandson, R. M.

Lay, Jr.; that after the death of the said Nancy Lay, her said grandson, R. M. Lay, Jr., was appointed and qualified as administrator of the estate of his said grandmother, the said Nancy Lay, deceased; that the respondents and cross-complainants are the widow and children or legal heirs at law of the said R. M. Lay, Jr., deceased; that after the death of the said R. M. Lay, Jr., his son, R. C. Lay, was appointed and qualified as administrator de bonis non of the estate of the said Nancy Lay, deceased, as successor of his father, deceased, as administrator; that during the lifetime of the said R. M. Lay, Jr., he, as administrator of his said grandmother's estate, made, without authority of law, or sanction of any court, two fee contracts with said King & King, Attorneys, to prosecute said claim, in each of which contracts the legal title to and ownership of said claim was asserted and recognized to be in the estate of Nancy Lay, deceased, and to one of which contracts, the oath of the said administrator was made that said claim belonged to the estate of Nancy Lay, deceased, filed a suit against the United States on said claim in the Court of Claims, and in support of such claim, made oath and produced such evidence as to cause said court of claims finally to find and adjudicate that said claim belonged solely to the estate of Nancy Lay, and that her estate was entitled to the amount thereof, and that no assignment had been made to any one."

And the decree of the presiding judge, in addition to the statement of facts hereinbefore set out, contained the following provision:

"That the bill of complaint be, and the same is hereby sustained, and that the cross-bill be and is hereby dismissed, for the reason that the cross-complainants, as the heirs and privies of R. M. Lay, Jr., deceased, are estopped to claim said sum or fund because of the said administrator and the final judgment of the court of claims adjudging this sum or fund to belong to the estate of Nancy Lay, deceased."

As the result thereof, a decree was rendered, denying

the right of the defendants in error to any part of the fund, and awarding to the plaintiffs in error, as the representatives of Mrs. Nancy Lay, deceased, the entire fund.

The trial court further held that the attorneys, Messrs. King & King, were not entitled to any further or additional compensation than that provided by the Act of Congress.

The defendants in error in this motion, as well as Messrs. King & King, prosecuted an appeal to the Supreme Court of the State of Mississippi, and the Supreme Court of the State of Mississippi reversed the judgment of the Chancery Court of Scott County, Mississippi, and entered a decree, paying to Messrs. King & King the unpaid portion of their fee of 30 per cent., and awarding the balance of the fund to the heirs at law of R. M. Lay, Jr., in accordance with the agreement had and entered into by and between Mrs. Nancy Lay and R. M. Lay, Jr. The opinion of the Supreme Court of the State of Mississippi is as follows:

"This appeal is prosecuted from a decree of the Chancery Court of Scott County, awarding to the appellees $2,243.20, now in the hands of R. C. Lay, as administrator de bonis non of the estate of Mrs. Nancy Lay, deceased. About the year 1870, Mrs. Nancy Lay, a resident of Scott County, departed this life, leaving an unsatisfied claim against the United States Government for the destruction of certain of her property by Federal soldiers during the civil war. During the life of Nancy Lay, she asserted her claim against the United States Government, and employed one T. B. Johnson, an attorney, to represent her; but for some reason, Nancy Lay declined to prosecute her claim further at her own expense, and preferred to assign, and did elect to assign and give her claim to her grandson, R. M. Lay, Jr., then a young man, who had formerly been taken into her home as a member of her household. We shall not here state or analyze the facts in reference to this assignment. This is due to the

fact that the transcript of the stenographer's notes has, by motion of the appellees, been stricken from the record, and while there are certain depositions left in the record, it yet remains that all the facts before the chancellor are not now lawfully a part of the record, and we must look to the findings of fact and the conclusions reached by the chancellor in his final decree. The decree shows upon its face that the issues presented to the chancellor were heard upon the pleadings, and upon "depositions and oral testimony," and the decree recites in part that, "It appearing to the court that during the late civil war, there accrued to the said Nancy Lay, now deceased, a claim againt the United States for the value of certain of her property taken or destroyed by the Union or Federal army; that prior to her death, the said Nancy Lay assigned and transferred her said claim against the United States to her grandson, R. M. Lay, Jr.; that after the death of said Lay, her said grandson, R. M. Lay, Jr., was appointed and qualified as the administrator of the estate of his said grandmother, the said Nancy Lay, deceased," etc. The decree recites that a suit in the court of claims was prosecuted to a successful termination, and that the attorneys employed to do the work were King & King of Washington. The court of claims allowed and paid the sum of $2,804.00. Congress in appropriating the money to pay the judgment, provided by Sec. 4 of the Act as follows:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent, or agents, attorney or attorneys, on account of services rendered or advances made in connection with said claim."

The written contract for the employment of King & King provided for the payment of "a fee equal to 50 per cent of the amount which may be allowed on said claim;" but on account of said section of the Act, only 20 per cent. was paid direct to the attorneys, and the balance, $2,-243.20, was paid to the administrator de bonis non and

accounted for in his final account. The final account asked the chancellor to direct how and to whom these funds should be paid. In addition to the presentation of the final account, certain heirs at law and devisees of Nancy Lay, the deceased, filed their original bill of complaint in this cause, claiming the funds in question under the residuary clause of the last will and testament of Nancy Lay. The heirs of R. M. Lay, Jr., answered this bill, and made their answer a cross-bill, in which they claim the funds under the gift and assignment executed by Nancy Lay to the said R. M. Lay, Jr. Without a further statement of the pleadings or the relationship of the parties, it may be stated briefly that there are two questions presented by this appeal. First, the validity of the assignment by Nancy Lay to her grandson is attacked as being in violation of Sec. 6383, United States Compiled Statutes, Annotated, formerly Revised Statutes, Sec. 3477, being in the following words:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer at the time of the acknowledgment, read and fully explained the transfer, assignment or

warrant of attorney to the person acknowledging the same."

It is also claimed that the heirs at law of R. M. Lay, Jr., are now estopped to claim the funds because of the fact that R. M. Lay, Jr., in his lifetime prosecuted the claim against the government in the name of Mrs. Nancy Lay; that he made affidavits that Nancy Lay was the owner of the claim, and represented to and contended before the court of claims that she was the unconditional owner. The second point presented by the appeal is the validity of the claim of King & King, and Judge Paul B. Johnson, son of the Mr. Johnson first employed as attorney, for a balance of 30 per cent of the funds as attorneys' fees. The contract for the employment of the attorneys was executed in writing by R. M. Lay, Jr., as the lawful administrator of Nancy Lay, and after his death the contract was renewed by R. C. Lay as administrator de bonis non. By both of these contracts, the attorneys' were to receive 50 per cent of the amount allowed and collected. It is conceded that the attorneys prosecuted the claim with diligence and ability, but recovery was denied by the learned chancellor because of the Act of Congress quoted in part above. The court also held that R. M. Lay, Jr., and his heirs were estopped to claim the funds notwithstanding the gift and assignment. So it is that the facts have been settled by the chancellor, and the questions presented to us are purely questions of law.

We shall first discuss and dispose of the question of attorney's fees. Appellants contend that Sec. 4 of the Act is unconstitutional and void, being in derogation of appellees' liberty of contract without due process of law, and operating to deprive appellees of their property and the fruits of their lawful contract without due process of law. It is also contended that the attorneys, who are appellants herein, have an equitable lien upon the funds produced by their professional labors and by the expenditure of their time and money. It is nowhere shown that the contract made with the attorneys is invalid, although

the contention is made that the amount of the fee is unreasonable and that the contract violates Sec. 4 of the Act of Congress making the appropriation. If the administrator would have been justified in paying this claim and taking credit therefor, then the allowance would now be proper. It appears that the real obstacle in the way of the allowance is the Act of Congress, and this brings us to the constitutionality of this statute. Without attempting a reasoned opinion upon this subject, we are satisfied with the conclusions reached by the Supreme Court of Tennessee, Kentucky and the District of Columbia. Section 4 of the Act has been declared unconstitutional in the following cases: Moyers v. Fahey, 43 Wash. Law Rep. 641; Newman v. Moyers, 45 Wash. Law Rep. 774; Moyers v. Memphis (Tenn.), 186 S. W. 105; Black v. O'Hara (Ky.), 194 S. W. 811. The same result has been reached by certain other courts of original jurisdiction. In Newman v. Moyers & Consaul, supra, the Court of Appeals of the District of Columbia observed in a case dealing with the identical question:

> "When Congress attempted to reduce the fee called for by plaintiff's contract, it amounted to taking their property, due them under a private valid contract, and handing it over to another. If this is not a deprivation of liberty and property without due process of law, it would be difficult to conceive of a case where the inhibition of the Constitution would apply. * * It is difficult to conceive of a more dangerous or tyrannical system of government than that which would logically spring into existence if the legislative fiat were held to be supreme."

In the case of Black v. O'Hara, decided May 15, 1917, the Kentucky court said:

> "Congress was without power to dictate, upon the one hand, how the claimant should enjoy or use his property, when reduced to possession, or, upon

> **the other hand, to deprive appellant's testator, arbitrarily and without due process, of his property rights in his contract, because to do either would violate the Fifth and Fourteenth Amendments to the Constitution, which provide that no person shall be deprived of life, liberty or property without due process of law. * * * * The considered provision of the act was not an exercise of either an express or implied power of Congress, and was in contravention of a constitutional guaranty."**

The observations of the Supreme Court of the United States in the case of Allgeyer v. Louisiana, 165 U. S. 578; defining the meaning of the word "liberty" as employed in the Federal Constitution, are pertinent to the present inquiry. The validity of contingent fee contracts has been upheld by our courts, state and federal.

As to the reasonableness of the fee, there is nothing in the record to show that the allowance would be excessive. The amount of the fee was satisfactory to R. M. Lay, Jr., who himself entered into the written contract; and under the view which we entertain of the other point argued, we do not think appellees are in position to question the amount. We conclude, therefore, that the attorneys are entitled to their balance of 30 per cent. in accordance with the terms of the written contract.

As between the parties to this suit, the rival claimants of the net funds, after attorneys' fees and expenses have been paid, we conclude that the heirs at law of R. M. Lay, Jr., should recover. We repeat that the chancellor found as a fact that Nancy Lay in her lifetime assigned and transferred her interest in the claim to R. M. Lay, Jr. We assume that he was fully warranted by the testimony in so finding. The Federal statute rendering null and void all transfers and assignments of a claim against the United States prior to the time such claim is allowed and warrant issued therefor is not controlling as between ap-

pellants and appellees. As stated by our own court in Fewell v. American Surety Co., 80 Miss., 782:

> "The United States is not interested in this litigation. The contract was fully executed so far as the Government was concerned. * * * The primary purpose of these statutes is to protect the Government, and they can not be relied upon for protection by parties situated as the appellees are,"

citing Goodman v. Niblack, 102 U. S. 566; Bailey v. United States, 109 U. S. 432; Nobbs v. McLean, 117 U. S. 567; Freedman's Savings Co. v. Shepherd, 127 U. S. 494; Yorke v. Conde, 147 N. Y. 486, approved in 168 U. S. 642. All of these authorities are in point, and have been referred to with approval by our own court. They settle the question that the Federal statute has no application between the contesting claimants of the funds, the United States being in no way a party or interested in the result. See, also, Burnett v. Mayor and Aldermen of Jersey City, 31 N. J. Eq., 341; Hawes & Co. v. Triggs (Va.), 65 S. E. 538; Farmers' National Bank v. Robinson (Kans.), 53 Pac. 762; Jernegan v. Osborne (Mass.), 29 N. E. 520. The primary object of the statute was to prevent fraud against the United States, and the Government can always rely upon the statute in any case where it is directly interested. Here, the Government has allowed the claim, made an appropriation therefor, and fully paid the judgment rendered by the court of claims. The funds are now under the jurisdiction of our state court, and the equitable and legal rights of the parties must govern. We do not think the appellants are estopped to claim the funds. Our court has many times declared the essential elements of estoppel. There is no showing whatever that the mere presentation of this claim, first, in the name of Mrs. Nancy Lay, and, thereafter, in the name of her administrator prejudiced the rights of appellees in any manner or to any extent. The position assumed by R. M. Lay, Jr., in his lifetime did not cause appellees to change their position to their hurt or injury, and did not operate to deprive them of any

of their rights. If there was a valid claim, it was to the interest of all parties concerned to have that claim prosecuted and allowed. This, R. M. Lay, Jr., did. Now, that the claim has been paid, the sole question before us is one of real ownership, and in answering this question, the equitable and legal rights of the parties, unaffected by Federal statutes, must govern. The facts being settled, there is no occasion to remand this cause for further proceedings. We direct that decree be entered here dismissing the bill of complaint exhibited by appellees; that the cross-bill of appellants be sustained; that the attorneys, King & King and Paul B. Johnson, be given a decree for the balance of their attorneys' fees; that the costs of this appeal be paid out of any moneys now in the hands of the administrator, and that the net proceeds of the fund in question be paid over to the heirs at law of R. M. Lay, Jr., in accordance with the views expressed in this opinion.

Reversed and decree here for appellants.

Accordingly, a decree was entered by the Supreme Court of the State of Mississippi, from which decree, this appeal is prosecuted, and the following error is assigned by the plaintiffs in error.

"PETITION FOR WRIT OF ERROR.

"Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled case, the appellees hereby pray a writ of error from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

"ASSIGNMENT OF ERRORS.

"And the said J. F. Lay et al., appellees, assign the following errors in the records and proceedings of the said case:

"The Supreme Court of Mississippi erred in holding and deciding that Section 3477 of the Revised Statutes of the United States had no effect, operation or application in the said case; that the final judgment of the United States Court of Claims, adjudging the title of the property in question to belong to the person through whom appellees claim, had no effect, operation or opplication in said case; and that Section 4 of the Act of Congress of March 4, 1915, limiting to twenty per centum the amount of fees to be paid to attorneys on account of services in connection with certain claims against the United States, was invalid and unconstitutional.

"The said errors are more particularly set forth as follows:

"The Supreme Court of Mississippi erred in holding and deciding:

"First. That the voluntary assignment of a claim against the United States, prior to the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, was valid and effective, notwithstanding the provisions of Section 3477 of Revised Statutes of the United States, the appellees contending that such assignment was null and void under said section of the Revised Statutes.

"Second. That the final judgment of the United States Court of Claims adjudging the claim against the United States and its funds or proceeds in question in said case, to be the property of the person through whom appellees claim, had no effect, operation or application in said case, the appellees claiming in accordance with the said

judgment of the Court of Claims and the appellants to the contrary.

"Third. That Section 4 of the Act of Congress of March 4, 1915, limiting to twenty per centum the amount of fees to be paid attorneys on account of services rendered in connection with the claim against the United States, in question in said case, was invalid and in violation of the Constitution of the United States.

"For which errors, the appellees pray that the said judgment of the Supreme Court of the State of Mississippi, dated June 3rd, 1918, be reversed and a judgment rendered in favor of the appellees and for costs."

"J. C. BRYSON,
"WM. I. McKAY,
"Attorneys for Appellees.

"State of Mississippi,
"Supreme Court.

"Let this writ of error issue upon the execution of a bond by the appellee to the appellants in the sum of one thousand dollars; such bond, when approved, to act as a seupersedeas.

"SYDNEY SMITH,
"Chief Justice, Supreme Court of Mississippi."
"Dated July 9, 1918."

Plaintiffs in error secured a writ of error from the Chief Justice of the Supreme Court of the State of Mississippi, but have secured no writ of certiorari from this Court, as required by law.

STATEMENT OF THOSE PORTIONS OF THE RECORD PRINTED AND APPENDED HERETO.

For the purpose of the motions, the defendants in error, pursuant to the rules and practices of this Court, have caused to be printed and attached to this brief por-

tions of the record embodying all the material and pertinent parts of the transcript which relate to the motions filed therein, omitting those parts of the transcript which are not essential to the proper consideration of the motions.

Carey v. H. & T. C. Ry. Co., 150 U. S. 179;
Walston v. Nevin, 128 U. S. 578.

ARGUMENT.

POINT I.

Right, privilege or immunity asserted by plaintiffs in error under Section 3477, Rev. St. U. S., not presented because no writ of certiorari obtained.

At the threshold of this argument, it is only necessary to call attention of the court to the fact that the plaintiffs in error have not secured a writ of certiorari from this Court, as provided by Section 237 of the Judicial Code of the United States. The Plaintiffs in error assign as error the action of the Supreme Court of the State of Mississippi in holding inapplicable to the present case Section 3477 of the Revised Statutes of the United States. In other words, it is the claim of the plaintiffs in error that under such section, defendants in error could acquire no right, title or claim to the funds forming the subject-matter of this litigation; and under the same section, plaintiffs in error assert that title to the fund in question was vested in the plaintiffs in error.

Conceding for the purposes of this argument that a Federal question is presented by such assertion, there was but one way for the plaintiffs in error to present this contention to this Court, and that was by obtaining a writ of certiorari from this Court. The question is not presented by a writ of error from the State court. The opinion of this Court, through Mr. Justice Vandeventer, in the case

of Philadelphia & Reading Coal & Mining Co. v. Gilbert, 245 U. S. Rep. 162, leaves nothing to be said. In that connection, the Court used the following language:

> "Under Sec. 237 of the Judicial Code, as amended September 6th, 1916, c. 448, 39 Stat. 726, a final judgment or decree of a state court of last resort in a suit 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity,' may be reviewed in this court upon writ of error; but if the suit be one 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority,' the judgment or decree can be reviewed in this court only upon a writ of certiorari. The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorai is granted or refused in the exercise of a sound discretion "

POINT II.

Appeal will be dismissed where no Federal question is presented.

It is well settled that where a writ of error to this court presents no Federal question, the court acquires no jurisdiction, and the appeal will be dismissed. It is equally well settled that where the alleged Federal questions are wholly formal or so devoid of merit as to be frivolous, or have been so explicitly foreclosed by the decisions of this Court as to leave no room for real controversy, this Court will decline to entertain jurisdiction thereof. Mr. Taylor, in his work on Jurisdiction and Procedure in the United States Supreme Court, says:

> "A writ of error from the Federal Supreme Court will be dismissed, where the Federal question relied upon to such jurisdiction manifestly lacks all color of merit."

And in the case of Equitable Life Assurance Society v. Brown, 187 U. S. 308, 47 Law Ed. 190, this Court said:

> "But it is well settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real substantive question on which the case may be made to turn; that is, a real and not merely formal Federal question is essential to the jurisdiction of this Court. Stated in another form, the doctrine, as declared, is that, although in considering a motion to dismiss, it be found that a question adequate, abstractly presented, to confer jurisdiction was raised, if it likewise appear that such question is wholy formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision, or decisions, of this Court as to leave no room for real controversy, the motion to dismiss

will prevail New Orleans Water Works Company v. Louisiana, 185 U. S., 336, and authorities there cited."

The same rule is found in the following cases:

New York & N. E. R. R. Co. v. Bristol, 151 U. S. 556, 38 Law. Ed. 269;

Southern R. R. Co. v. Carson, 194 U. S. 136, 48 Law. Ed. 907;

Louisville & Nashville R. R. Co. v. Melton, 218 U. S. 36, 54 Law. Ed 921;

Easterling Lbr. Co. v. Pierce, 235 U. S. 380, 59 Law. Ed. 279.

Erie R. R. Co. v. Solomon, 237 U. S. 427, 57 Law. Ed. 1033;

Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 58 Law. Ed. 1245.

Our position is that no Federal question was raised or presented in the lower court; but, if mistaken in this, our position then is that a Federal question, even if raised and presented, is purely formal, devoid of merit, has been foreclosed by previous adjudications of this Court, and the writ of error prosecuted merely for delay. In order to maintain these motions, we desire to submit the following propositions, supported by citation of authorities:

POINT III.

The United States having fully paid and discharged the claim had against it by the estate of Nancy Lay, deceased, and such fund having been paid and delivered to the custody of the Chancery Court of Scott County, Mississippi, and all liability against the United States by reason of such claim having become extinguished, Section 3477 of the Revised Statutes of the United States, being Section 6383 of the Compiled Statutes, Ann., was without application, and the Supreme Court of the State

of Mississippi had the right, having the exclusive control and jurisdiction of such fund, to direct its distribution and application in accordance with what it determined to be the strongest equities.

The Act of Congress referred to is as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

Our position is that this section was in no manner involved, and is not applicable to the present controversy, for the reason that no claim was pending against the United States at the time of the rendition of the decree appealed from. Upon the other hand, the United States confessedly and admittedly had extinguished all liability against it by reason of its having paid the fund in question into the Chancery Court of Scott County, Mississippi; that it was without interest in the controversy; and, therefore, the inapplicability of the Federal statute referred to

has been repeatedly foreclosed by the adjudications of this Court.

The case of York v. Conde (N.Y.), 42 N. E., 193, 168 U. S. 642, 42 Law. Ed., 611, is decisive of this controversy. In that case, a contractor had a contract with the United States for the erection of a public building in the state of New York. In order to secure an indebtedness, he made an assignment of a certain portion of the fund owing him by the United States arising out of such contract. Subsequently, and for the same purpose, the contractor made another assignment to a different firm of such fund, such latter assignee having actual notice of the prior assignment. The United States paid the fund to the latter assignee. Suit was brought by the prior assignee, and the invalidity of the assignment in question to the holder of the first assignment, growing out of the Federal statute involved in this controversy, was pleaded. The appellate court of New York, however, held that since the United States had divested itself of all interest in the fund by reason of its payment and extinguishment of all liability against itself, the statute in question was inapplicable, using the following language:

> "Its object was to protect the government. It was enacted, as was said by Mr. Justice Miller in Goodman v. Niblack, 102 U. S., 556, to prevent embarrassments to the government which might arise if it was compelled to recognize rights of third persons not parties to the original contract or transaction; and, second, to shut the door to improper influences in prosecuting claims before the departments or courts of Congress. There are two theories of construction of the statute: One is that which gives the widest meaning to the words, and which makes a transfer or assignment of a claim or interest void, not only as to the government and its officers, but as to the parties to the transfer or assignment. Upon this theory, the money, when paid over to the original claimant, can not be

reached in his hands, unless after the allowance of the claim and the issuing of a warrant for its payment, the provisions of the section are complied with. This theory wholly forbids the acquisition before this has been done of any right in the fund through any transfer or assignment, however formal the instrument, or however just and innocent the transaction. The other theory is that the objects of the statute are accomplished by a construction which makes an assignment or transfer made before the allowance of a claim void as between the claimant and the government, but leaves the transferee, after the fund has come to the hands of the claimant, to assert such legal rights against the fund, and avail himself of such legal remedies to enforce them, as exist in other cases of transfer. The Supreme Court has consistently maintained that a transfer or assignment made before the allowance of a claim was void at the election of the government, and that, as against the assignee or transferee, the government may wholly disregard it, and that payment made to the original claimant by the government is a good acquittance of the liability, although it had notice of the transfer at the time. But the court has also decided that the government may recognize such a transfer, and that payment to the transferee will protect it against any subsequent claim of the original party. Bailey v. U. S., 109 U. S., 432, 3 Sup. Ct. 272."

On appeal to this court, a motion was made by the defendant in error to dismiss or affirm, just as is made in the present case, upon the ground that no Federal question was involved, since the Federal statute had no application to a case where no claim was pending against the United States. This Court dismissed the writ of error, holding the statute inapplicable, using the following language:

"Many decisions of this court in respect of Sec. 3477 were then considered, and the conclusion reached that the section had been so construed as to permit transfers made in the legitimate course of business, in good faith, to secure an honest debt, while they might be disregarded by the government, to be sustained as between the parties so far as to enable the transferees, after the government had paid over the money to its contractors, to enforce them against the latter, or those taking with notice. The court held in effect that such was the transaction in the case at bar, and that the transfer to York and Starkweather was simply to secure them for material actually used by the contractors in performing their contract with the government, and amounted to nothing more than the giving of security, and not to the assignment of a claim to be enforced against the government. The United States had, in due course, paid over the money to the contractors, and between them there was no dispute; nor had the United States any concern in the question as to which of the several claimants was entitled to the fund, the proper distribution of which depended on the equities. What the New York courts determined was that the equities of York and Starkweather were superior to those of Conde and Streeter, and judgment went accordingnly. In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority under, the United States, that title or right must be a title or right of the plaintiff in error, and not of a third person only; and the statute or authority must be directly in issue. In this case, the controversy was merely as to which of the claimants had the superior equity in the fund; the statute was only collaterally involved; and plaintiff in error asserted no right to the money based upon it."

This decision is directly in point, and is conclusive of the present controversy. Opposing counsel will necessarily concede that in order to overrule the motion to dismiss or affirm in this case, the case will necessarily be overruled. The statute in question has been frequently construed by this court, and from these decisions there arises a thoroughly well-established rule that the statute, while it is enforcible between the parties and is perfectly valid, in order that it may be applicable, there must be pending at the time an unsatisfied claim against the United States, asserted, or threatened to be asserted, by the party falling within the condemnation of the statute; and it is equally as well settled that the statute has no application, if at the time of the rendition of the judgment or decree, there be no outstanding claim assertable against the United States.

The case of Goodman v. Niblack, 102 U. S., 556, 26 Law. Ed., 229, is directly in point. In that case a man by the name of Sloo had a claim against the United States. He became insolvent, and made a general assignment to certain trustees for the benefit of his creditors, and the question was presented as to whether or not such assignment of the claim against the United States passed under a voluntary assignment for the benefit of creditors, in view of the Federal statute involved in this case. This court held that the assignment did not offend against the statute, because the United States Government had paid the entire sum; there was no controversy between the United States and any other parties in respect to the claim, using the following language:

> "And it is understood that the Circuit Court sustained the demurrer in this case under pressure of the strong language of the court in Spofford v. Kirk. We do not think, however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in con-

> troversy, and it was clearly within all the mischiefs designed to be remedied by the statute. These mischiefs, as laid down in that opinion, and in the others referred to, were mainly two."

The question was also presented in the case of Hobbs v. McLean, 117 U. S., 567, 29 Law. Ed., 940. In that case an individual made a contract with the United States for the erection of a public work. He then formed a partnership with other persons, to whom he transferred his interest in the contract. A controversy arose over the disposition of the fund, and the invalidity of the transfer, as being violative of the statute referred to was claimed, in respect to which contention, this Court used the following language:

> "We are of the opinion that the partnership contract was not opposed to the policy of the statute. The section under consideration was passed for the protection of the government. Goodman v. Niblack, 102 U. S., 556, 26 Law. Ed., 229. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal and it might always know with whom it was dealing when a contract was completed and settlement made. The purpose was not to dictate to the contractor what he should do with the money received upon his contract after the contract had been performed."

The statute was under consideration by this court in the case of Bailey v. United States, 109 U. S. 430, 27 Law. Ed. 988. In that case there was an assignment of certain funds owing by the United States and a power of attorney given to collect the same. The power of attorney was recognized by the government, the fund delivered to the attorney and assignee. The assignors claimed that the payment was void, because made in violation of the statute now under consideration. This Court held otherwise, using the following language:

"In the case before us, the question arises as to the transfer or assignment of a claim against the government. The question is whether payment to one, who has been authorized to receive it, by the power of attorney executed before the allowance of the claim by the Act of Congress, was good as between the government and the claimant, where, at the time of payment, such power of attorney was unrevoked. If, in respect of transfers or assignments of claims, the purpose of the statute, as ruled in Goodman v. Niblack, was to protect the government, not the claimant in his dealings with the government, it is difficult to perceive upon what ground it could be held that the statutory inhibiiton upon powers of attorney in advance of the allowance of the claim and the issuing of the warrant, can be used to compel a second payment after the amount thereof has been paid to the person authorized by the claimant to receive it. A mere power of attorney given before the warrant was issuued,—so long, at least, as it is unexecuted,—may undoubtedly be treated by the claimant as absolutely null and void in any contract between him and his attorney in fact. And it may be so regarded by the officers of the government whose duty it is to adjust the claim and issue a warrant for its amount. But if those officers chose to make payment to the person whom the claimant by formal power of attorney has accredited to them as authorized to receive payment, the claimant can not be permitted to make his own disregard of the statute the basis for impeaching the settlement had with the agent. To hold otherwise would be inconsistent with the ruling heretofore made,—and with which, upon consideration, we are entirely satisfied,—that the purpose of Congress, by the enactments in question, was to protect the government against frauds upon the part of claimants and those who might

become interested with them in the prosecution of claims, whether before Congress or the several departments, the title of the Act of 1853 suggests this purpose. It is to prevent frauds upon the treasury."

The case of Rodman M. Price v. Forrest, 173 U. S. 410, 43 Law. Ed. 749, is in point. In that case, a man by the name of Price had a claim against the United States. Having become involved with his creditors, a receiver was appointed to obtain the warrant and collect the money from the United States. It was contended by the heirs of the claimant Price that the transaction was an assignment, was in violation of the statute, and passed no title to the receiver and those claiming under him. It appeared, however, that the United States had paid the money into court, that no claim was pending against the United States by reason thereof, and that it was without interest in the controversy. This Court held the statute inapplicable, using the following language:

"While the present case differs from any former case in its facts, we think that the principle announced in Erwin v. United States and Goodman v. Niblack justified the conclusion reached by the state court. That court held that it had jurisdiction under the laws of the state, and as between the parties before it, to put into the hands of its receiver any chose in action of whatever nature belonging to Price and of which he had possession or control. The receiver did not obtain from Price in his lifetime an assignment of his claim against the United States. But having full jurisdiction over him, the court adjudged that as between Price and the plaintiffs who sued him, the claim should not be disposed of by him to the injury of his creditors, but should be placed in the hands of its receiver subject to such disposition as the court might determine as between the parties before it and as was consistent with law. The suit in which the receiver

> was appointed was, of course, primarily for the purpose of securing the payment of the judgment obtained by Samuel Forrest in his lifetime against Rodman M. Price. But that fact does not distinguish the case in principle from Goodman v. Niblack; for the transfer in question to the receiver was the act of the law, and whatever remained, whether of property or money, in his hands after satisfying the judgment, and the taxes, costs or expenses of the receivership, as might be ordered by the court, would be held by him as trustee for those entitled thereto, and his duty would be to pay such balance into court to the credit of the cause, 'to be there disposed of according to law.' Revision of N. J. 1876, p. 394."

The case of McGowan v. Parrish, 237 U. S. 285, 59 L. Ed. 955, is directly in point. In that case, Mr. McGowan, an attorney, had a contract for collection of a claim against the United States, and had an assignment of an interest in the claim for his fee. After the allowance of the claim by Congress, when the money was about to be paid to the original claimants, to the exclusion of the attorney, suit was filed by the attorney in order to enforce a lien on the warrant in process of delivery. It was agreed between the parties that an amount sufficient to satisfy the alleged claim of the attorney should be paid into court in order that the rights of the attorney might be determined. The United States paid the money into court, secured immunity from all liability, and in that case the question of the assignment was presented, and this Court said that the statute was for the protection of the government, and since there was no claim asserted against the government, but that the money had been paid into court, under the facts in that case, the statute was inapplicable, using the following language:

> "As to the effect of Section 3477 Rev. Stat., Comp. Stat. 1913, Sec. 6383, it has been several times declared by this court that the statute was

intended solely for the protection of the government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they, in their judgment, deem proper. Goodman v. Niblack, 102 U. S. 556, 560, 26 L. Ed. 229, 231; Bailey v. United States, 109 U. S. 432, 439; 27 Law Ed. 988, 990, 3 Sup. Ct. Rep. 272; Hobbs v. McLean, 117 U. S. 567, 576, 29 L. Ed. 940, 943, 6 Sup. Ct. Rep. 870; Freedman's Savings & T. Co. v. Shepherd, 127 U. S. 494, 506, 32 L. Ed. 163, 168, 8 Sup. Ct. Rep. 1250; Price v. Forrest, 173 U. S. 410, 423, 43 L. Ed. 749, 753, 19 Sup. Ct. Rep. 434. But see Nutt v. Knut, 200 U. S. 12, 20; 50 Law. Ed. 348, 352, 26 Sup. Ct. Rep. 216.

"In this case, the officers of the government, after the suit was commenced (the claim having already been allowed and finally adjudicated), found that they needed no protection from the statute, and were safe in paying into court to the credit of the cause a sufficient amount to answer the claim of complainants. The amount being paid, the Court took control of it, and, with the consent of the other parties, dismissed the Secretary of the Treasury and the Treasurer of the United States from the cause."

The case of Portuguese American Bank v. Wells, 242 U. S. 7, 61 Law. Ed. 116, is illustrative. In that case, this Court took occasion to reaffirm the principle which we are now advocating. In that case, a contractor had a contract with the City of San Francisco, which contained a provision that no part of the fund arising out of the contract should be assigned without the consent of the City of San Francisco. The Portugese American Bank took an assignment of the fund, and the same was accepted by the city. Subsequently, the contractors failed, the city paid the fund to the trustee in bankruptcy, and the suit was an effort upon the part of the assignee to enforce a lien upon the fund; in other words, to enforce its assign-

ment. It was pleaded in that case upon the part of the general creditors of the bankrupt that the contract forbade the assignment. This Court said, however, that the provision was for the benefit of the municipality, was not available, and could not be asserted by any other litigant, using the following language:

> "The assignability of a debt incurred under a contract like the present sometimes is sustained on the ground that the provision against assignment is inserted only for the benefit of the city. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated hardly is material here. It is enough to say that we are of opinion that, upon the facts stated, the assignment was not absolutely void, that therefore the bank got a title prior to that of Welles, and, consequently, that the decree must be reversed. See Hobbs v. McLean, 117 U. S. 567, 29 L. Ed. 940, 6 Sup. Ct. Rep. 870; Burnett v. Jersey City, 31 N. J. Eq. 341; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572."

In that case, the court reviewed the decisions of two state courts, which are directly in point.

Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572. In that case, the contractor had a contract with the municipality for doing public work, which contract contained a provision that there should be no assignment of the proceeds of the contract, or any portion thereof, without the consent of the municipality. An assignment was made, but no consent of the city was obtained. Subsequently, another assignment was made to a different assignee, who obtained the consent of the city to the assignment. A controversy having arisen between the respective assignees, the city paid the amount into court, divesting itself of all interest in the controversy, and the Court of Appeals of New York held that, as between the respective assignees, the interest of the city not being involved, the

one prior in point of time obtained the best title, using the following language:

> "The provision of the contract adverted to has been treated by the court below as rendering void all assignments of moneys to grow due unless the consent of the city was obtained, and as available by any assignee to defeat the rights of a senior assignee who had failed to secure the necessary consent. We do not think that this provision is capable of any such construction. It was inserted in the contract solely for the benefit of the city, and prevents any claim being asserted against it in the absence of the consent. It is a shield to protect the city, and not a weapon with which a junior assignee is to fight his way to a more favorable position in the line of payment. The general term held that this case is governed by the maxim, 'Modus et conventio vincunt legem.' The late Judge Allen of this court liberally translated the maxim as follows: 'The terms and conditions of a contract have the force of law over those who are parties to it.' Lowrey v. Inman, 46 N. Y. 129. As between Dawson and the city, the covenant we are considering does have the force of law, for the reason they are parties to the contract, and come within the express terms of the maxim quoted; but the bank is not a party, and can not invoke this provision of the agreement to defeat the claim of Patten. The city has paid into the court the money due under the contract, and will be protected by any judgment rendered. No claim is being asserted against it, and the covenant does not apply to the situation now presented."

The case of Burnett v. Mayor and Aldermen of Jersey City, 31 N. J. Eq. 341, was also cited by this Court with approval in the case of Portugese Bank v. Welles. In that case, a contractor contracted with a municipality to do certain work, the contract containing a stipulation

against the assignment of the fund, or any part thereof, without the consent of the municipality. The contractor assigned a portion of the fund to a material man. Subsequently, another material man served written notice on the city, which under the laws of New Jersey gave him a superior lien against the fund. The question of priority as between the assignee and the material man who served notice in compliance with the New Jersey statute arose, and it was contended that the assignment was void because the contract stipulated that no such assignment should be had. It was held otherwise by the court, however, using the following language:

> "They insist that the assignments of the fund by Ditmar were void as against them, upon two grounds: First, because they are in violation of the contract between Ditmar and the city. Second, they are fraudulent, and against the policy of the lien law.
>
> "The contract for the erection of the building contained a provision that the contractor should not, by power of attorney or otherwise, assign any of the moneys paid under the agreement, unless by and with the consent of the Board of Public Works, to be signified by indorsement upon the agreement, and that if the contract should be assigned otherwise than as therein specified, the Board should have the power to notify the contractor to discontinue all work under the contract, and, also, power to complete the work themselves, at the contractor's expense, the cost to be deducted out of the moneys due, or to become due, to him under the agreement. It is alleged that the express consent of the Board of Public Works was not given or indorsed on the agreement pursuant to its provisions, but, if true, the omission can not avail the appellants or avoid the claims of the respondents under the assignment. The covenant and the penalty for its violation were evidently designed for the protec-

> tion of the city against the dereliction or insolvency of the contractor. The appellants had no interest in it, no right to demand its fulfillment, and were entitled to no indemnity for its violation."

The Supreme Court of Mississippi had previously passed upon the question in the case of Fewell v. American Surety Company, 80 Miss., 782. In that case, a contractor who had a contract for the erection of a government building became insolvent. Certain of his creditors took an assignment of the funds coming to him under the contract, and a committee of his creditors took charge of the work and completed the same, collecting from the United States government the balance unpaid under the contract. After the completion of the work and collection of the fund, creditors of the contractor, by attachment, attempted to reach the fund exclusive of the contractor's assignee, claiming that the assignment was prohibited by the Federal statute in question, that the title to the fund was still in the contractor and subject to legal proceedings against the original contractor. It appearing, however, that the United States Government had paid the fund into court, had obtained complete immunity for itself, and that no claim was had or obtained against the United States, the statute was inapplicable, the court using the following language:

> "The United States is not interested in this litigation. The contract was fully executed so far as the government was concerned. The building was completed and paid for, and this controversy is alone between the parties hereto as to the disposition of the money received for its erection. Therefore, Secs. 3737, 3477, United States Revised Statutes, relating to assignments of contracts made with the government, have no application. The primary purpose of these statutes is to protect the government, and they can not be relied upon for protection by parties situated as the appellees are.

Goodman v. Niblack, 102 U. S. 556; Bailey v. United States, 109 Ib. 432; Hobbs v. McLean, 117 Ib. 567; Freedman's Savings Co. v. Shepherd, 127 Ib. 494; York v. Conde, 147 N. Y. 486, indirectly approved in 168 U. S. 642."

Other state decisions are as follows:

Farmers' National Bank v. Robinson (Kans.), 53 Pac. 762. In that case, a contractor entered into an agreement with the United States to erect a government building. He borrowed some money from a National Bank in Kansas, and gave it as security an order to receive from the United States warrants as they were issued, with the understanding that the contractor would indorse the warrants and turn them over to the bank as receiver. One of such warrants was issued and got into the hands of another bank that had advanced to the contractor a small amount of money. The bank having the original assignment of the fund, demanded the money, which was refused. Suit was brought. It was contended that the assignment was in violation of the Federal statute involved in this controversy. The Supreme Court of Kansas held otherwise, using the following language:

> "The claim that the agreement of the parties was in violation of Section 3477 of the Rev. St. of the U. S. will not avail. That provision was intended for the convenience and protection of the government, and prohibits the assignment of claims before their allowance, the ascertainment of the amount due thereon, and the issue of the warrant for their payment. After the estimate was allowed and the warrant issued in payment of the claim, it was then delivered to the bank by Clum & Dingman under the authority of the building commission, the claim having been allowed and the warrant issued in payment therefor, the government was no longer concerned with the draft or the funds which it represented, and the disposition of the

same did not violate the spirit of the section mentioned. Under the transfer as made, the First National Bank acquired an equitable title to the draft and the funds represented to the extent of its claim. After a reading of the record, we are fully convinced that the decision of the Court is based upon abundant testimony, is just and equitable, and that no statutory provision was thereby violated. The judgment will be affirmed."

Hawes & Co. v. Triggs (Va.), 65 S. E. 538, is directly in point. In that case, a government contractor, in order to obtain funds for the purpose of carrying on a governmental public improvement, gave a local bank power of attorney to receive all sums of money coming to him, to collect the warrants and apply the same upon the indebtedness. The contractor became insolvent, the government paid the money into court, and divested itself of all interest in the fund, and an issue was made up between the rival claimants thereof. The Supreme Court of Virginia used the following language:

"It is admitted that the assignment relied upon by the bank is not in accordance with the terms of Section 3477. The contention of the bank is that the act was passed, as its preamble states, to prevent frauds upon the treasury of the United States, and that by a proper construction, it avoids all transfers and assignment of claims upon the United States, at the option and election of the government of the United States, but that, in this case, the government having seen fit to deposit the amount due upon the contract with the receiver of the court, and having received a full acquittance of all claims and demands growing out of the contracts which were assigned to the bank, has washed its hands of the whole transaction, and left the rights of the parties to be ascertained and decided in accordance with the laws of the state, unaffected by Section 3477 of the Revised Statutes; the final

analysis of the position of the bank being as follows: The transaction between the bank and the Trigg Company is valid as an assignment between these parties. It was made in the legitimate course of business, in good faith, to secure an honest debt, is opposed to no public policy, and is not within the mischief which was sought to be remedied by Section 3477."

The Supreme Court of Massachusetts had occasion to pass upon the identical question in the case of Jernegan v Osborne, 29 N. E. 520. In that case, a partnership had a contract for the erection of a certain public work for the United States Government. The partnership became financially involved, and one member of the partnership assigned all interest in the fund, including interest in the moneys from the United States, to the other members of the partnership. The fund was afterwards appropriated by Congress and paid to the other partners. Thereafter, the retiring partner brought suit to obtain a portion of the fund, upon the ground that the assignment was void. The Supreme Court of Massachusetts held that since the United States was without interest in the controversy, and no claim was asserted against it by reason thereof, the statute was inapplicable, using the following language:

"The claim of the plaintiff that the assignment is invalid under Sec. 3477 of the Revised Statutes of the United States would seem to derive some support from Newell v. West, supra. But in that case, the court relied in the main for this point upon Spofford v. Kirk, 97 U. S. 484. The statute has since been under consideration by the Supreme Court of the United States in other cases. Goodman v. Niblack, 102 U. S. 556; Bailey v. United States, 109 U. S., 432, 3 Sup. Ct. Rep. 272; Hobbs v. McLean, 117 U. S. 567; Trust Company v. Shepherd, 127 U. S. 494, 8 Sup. Ct. Rep. 1250. In Goodman v. Niblack, supra, the court says that there is

no doubt that the sole purpose of the statute was to protect the government, and not the parties to the assignment. This language is cited with approval in Bailey v. United States, supra, and the construction thus given to the statute is further upheld in Hobbs v. McLean, supra, and more strongly still in the last reported case which deals with the subject, viz, Trust Co. v. Shepherd, supra. It is also said in Goodman v. Niblack, supra, that the mischiefs which the statute was designed to prevent were two; first, the embarrassment to which the government might be subjected by having several persons, instead of one, to deal with, and by the introduction of strangers to the transaction; and, secondly, the introduction into the prosecution of claims, often speculative and desperate, before Congress and the departments, of the combinations and influences which might result from multiplying the number of persons interested in them as owners. None of these considerations affect the present case. The government has paid over the money, without objection, to the defendant as agent and managing owner of the Europa. The assignment by the plaintiff to the defendant of his interest in the claim was for the purpose of and as part of a settlement between them of all matters relating to the ship and voyage. Without undertaking to say that an assignor might not, under some circumstances, before the allowance of the claim, disregard his assignment, we think the plaintiff can not be permitted to do it in this case."

We respectfully submit that from these authorities it is perfectly apparent that no Federal question is presented by this record; that the Federal statute invoked is inapplicable. The object of the statute was to protect the United States against the presentation of fraudulent claims. Before the statute becomes applicable, it is necessary that there be pending or asserted some unsatisfied

claim against the United States. The statute is inapplicable in cases where the United States has secured immunity from liability by paying the fund into court and has divested itself of all interest in the controversy. In such case, if the statute is involved at all, it is only involved incidentally and collaterally, and before the construction of a statute shall present a Federal question, it is necessary that the statute shall be directly involved, and that some right be directly presented thereunder. It is not sufficient that a Federal statute was merely brought in question in the state court.

In the case of Ferry v. County of King, 141 U. S. 668, 35 Law. Ed. 895, where a similar question was involved, Mr. Chief Justice Fuller used the following language:

> "We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed. Snow v. United States, 118 U. S., 346, 30 Law. Ed. 207; B. & B. R. R. Co. v. Hopkins, 130 U. S. 210, 32 Law. Ed. 908; Cook County v. Calumet & C. Canal Co., 138 U. S., 635, 34 Law. Ed. 1110. The validity neither of statute nor authority was primarily denied here and the denial made the subject of direct inquiry, nor was there any decision whatever against the validity of statute or authority."

In the case of United States v. Lynch, 137 U. S. 280, 34 Law Ed. 200, this Court said:

> "In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn

in question when the existence, or constitutionality or legality of such statute or authority is denied and the denial forms the subject of direct inquiry."

In the case of Thos. P. Kennard v. State of Nebraska, 186 U. S. 304, 46 Law. Ed. 1175, the Court said:

> "But the validity of the Act of Congress referred to was not drawn in question by the facts of this controversy. Our jurisdiction to review the judgment of the State Court rests upon Section 709 of the Revised Statutes. It has often been held that the validity of a statute or treaty of the United States is not drawn in question within the meaning of Section 709 every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

The question is presented in the case of DeLamar Gold Mining Co. v. James Nesbit, 177 U. S. 524, 44 Law. Ed. 872, and was directly in point. In that case, the plaintiff in error who was defendant in the State Court, claimed the title to lands under a location made under the general mining laws of the United States. It was held, however, that no right, title or immunity having been asserted under the statute of the United States, the fact that its construction was involved raised no Federal question, the Court using the following language:

> "From the summary of the pleadings and findings of the Court, it is clear that the defendant set up no right, title or privilege, or immunity, under a statute of the United States, the decision of which was adverse in that particular. The mere fact that the mining company claimed title under a location made by Davidson under the general mining laws of the United States (Rev. St. Sec. 2325) was not in itself sufficient to raise a Federal question, since no dispute arose as to the legality of such location, except so far as it covered ground previously lo-

cated, or as to the construction of this section. We have repeatedly held that to sustain a writ of error from this Court, something more must appear than that the parties claim title under an Act of Congress.

"The subject is fully discussed and the prior authorities cited, in the recent case of Blackburn v. Portland Gold Min. Co., 175 U. S. 571, ante, 276, 20 Sup. Court Rep. 222, which was also a contest between rival claimants of a mine under Sections 2325 and 2326. It was held that the provision in Section 2326 for the trial of adverse claims to a mining patent by a court of competent jurisdiction did not in itself vest jurisdiction in the Federal Courts, although, of course, jurisdiction would be sustained if the requirements of amount and diverse citizenship existed; and that the judgment of the Supreme Court of the state in such case could not be reviewed in this Court simply because the parties were claiming rights under a Federal statute. A like ruling was made in the still later case of Florida C. & P. R. v. Bell, 176 U. S. 321, ante 486, 20 Sup. Ct. Rep. 399. See, also, California Powder Works v. Davis, 151 U. S. 389, 38 Law. Ed. 206, 14 Sup. Ct. Rep. 350."

The Supreme Court of Mississippi used the following language in respect to the matter under discussion:

"All of these authorities are in point, and have been referred to with approval by our own court. They settle the question that the Federal statute has no application between the contesting claimants of the fund, the United States being in no way a party or interested in the result." Citing authorities. "The primary object of the statute was to prevent fraud against the United States, and the Government can always rely upon the statute in any case where it is directly interested. Here, the Government has allowed the claim, made an appro-

priation therefor, and fully paid the judgment rendered by the Court of Claims. The funds are now under the jurisdiction of our State court, and the equitable and legal rights of the parties must govern."

We respectfully submit that the foregoing pronouncement by the Supreme Court of the State of Mississippi is sound. After this money was paid into the custody of the Chancery Court of Scott County, Mississippi, the United States had absolutely no interest, and it lay entirely within the jurisdiction of the state court to distribute the fund. In doing so, no Federal Statute was involved, but ordinary principles of right, equity and justice as the same were apparent to the state court, and as to such matters, this court has no control.

POINT IV.

Statute Limiting Attorneys' Fee to Twenty Per Cent.

The defendants in error in this case invited the state court to allow the fee of fifty per cent., as provided in the contract, taking the position that the contract was entered into in the utmost good faith, the services rendered, and the defendants in error do not desire in any court to question the payment thereof.

Plaintiffs in error, in their assignment of error, predicate ground for reversal upon the action of the Supreme Court of Mississippi in holding the Act of Congress limiting fees to twenty per cent. to be unconstitutional and void.

We direct the attention of Your Honors to the fact that if our position in the preceding points is well taken, it will be unnecessary for Your Honor to decide the constitutional question. In other words, if Your Honors shall agree with the Supreme Court of the State of Mississippi

that Section 3477, prohibiting assignment of claims against the United States, is inapplicable, and that no Federal question is presented by reason thereof, and that the question was only deviewable by a writ of certiorari, and not by a writ of error, then, there would be no occasion for Your Honors to decide the question in respect to the attorneys' fees, since only the defendants in error would be interested in the fund. They have prosecuted no cross-appeal from the judgment of the Supreme Court of the State of Mississippi in respect thereto; but, upon the other hand, invited the rendition of such decree as was rendered awarding to the attorneys, King & King, the full fee of fifty per cent. of the amount allowed.

We, therefore, respectfully invoke Subdivision 5 of Rule 6 of this Court, in the following language:

> "The Court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ of appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motion as is provided for in cases of motions to dismiss under Paragraph 4 of this rule."

If jurisdiction is maintained, we invoke the rule announced by the Mo. Pac. Ry. Co. v. Castle, 224 U. S., 511, wherein Chief Justice White said:

> "Defendant in error moves to affirm the judgment under Subdivision 5 of Rule 6. The motion we think should prevail, since the questions urged upon our attention as a basis for reversal of the judgment have been so plainly foreclosed by decisions of this Court as to make further argument unnecessary."

We also respectfully invoke the doctrine announced in Deming v. Carlisle Packing Co., 226 U. S. 102, through Chief Justice White, that, as the:

"Conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a Federal ground which is unsubstantial and frivolous. It follows that the question of delay is involved in and required to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decisions of this Court also leave it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is insubstantial and frivolous, the duty to affirm results."

We call the Court's attention to the following cases where, under the above rule, damages were allowed:

Prentice v. Parkersgill, 6 Wall. 709, where 10 per cent. was allowed;

Barrow v. Hill, 13 Howard 54, where 10 per cent. was allowed;

Tex. & Pac. R. R. Co. v. Wolfe, 101 U. S. 73, where 10 per cent. was allowed;

Deming v. Carlisle Packing Co., 226 U. S. 102, where 5 per cent. was allowed;

Southern Ry. Co. v. Guild, 233 U. S. 172, where 6 per cent. was allowed.

We, therefore, respectfully request that interest at ten per cent. damages be allowed as authorized by Subdivision 2 of Rule 23.

Respectfully submitted,

Attorney for Defendant in Error.

DECREE OF THE CHANCELLOR.

"In the Matter of the Estate of (Mrs.) Nancy Lay, Deceased, R. C. Lay Administrator De Bonis Non.

J. F. LAY, et al

v. No. 1016.

R. C. LAY et al.

"This cause having come on for final hearing, at the regular September term, A. D., 1916, of the Chancery Court of Scott County, Mississippi, on the first and final account and statement of R. C. Lay, as administrator de bonis non of the estate of (Mrs.) Nancy Lay, deceased; the bill of complaint of J. F. Lay, T. W. Lay, W. E. Lay, Nannie Lay Haley, Alvin Rape, Mack Rape, Jakie Rape and J. F. Lay as administrator de bonis non cum testamento annexo of R. M. Lay, deceased, and as executor of the last will and testament of James G. Lay, deceased; the claim-petition of George A. King and William B. King, attorneys, for additional fees; the answer and cross-bill of respondents and the cross complainants, R. C. Lay, (Mrs.) M. E. Lay, (Mrs.) I. A. Stewart and W. H. Lay; the answer of cross-respondents, J. F. Lay, T. W. Lay, W. E. Lay, Nannie Lay Haley, Alvin Rape, Mack Rape, Jakie Rape and J. F. Lay as administrator de bonis non cum testamento annexo of R. M. Lay, deceased; and as executor of the last will and testament of James G. Lay, deceased; depositions and oral testimony; and, after hearing oral argument of counsel, the cause was taken under advisement, and briefs on behalf of all parties were submitted; and it appearing to the court that, during the late civil war, there accrued to the said Nancy Lay, now deceased, a claim against the United States for the value of certain of her property taken or destroyed by the Union or Federal Army; that, prior to her death, the said Nancy Lay assigned and transferred

her said claim against the United States to her grandson, R. M. Lay, Jr.; that after the death of the said Nancy Lay, her said grandson, R. M. Lay, Jr., was appointed and qualified as the administrator of the estate of his said grandmother, the said Nancy Lay, deceased; that the above named respondents and cross-complainants are the widow and children or legal heirs of said R. M. Lay, Jr., deceased; that, after the death of said R. M. Lay, Jr., his son, the said R. C. Lay, was appointed and qualified as administrator de bonis non of the estate of said Nancy Lay, deceased, as successor of his father, deceased, as administrator; that during the lifetime of the said R. M. Lay, Jr., he, as administrator of his said grandmother's estate, made, without authority of law or sanction of any court, two fee contracts with said King & King, Attorneys, to prosecute said claim, in each of which contracts the legal title to and ownership of said claim was asserted and recognized to be in the estate of Nancy Lay, deceased, and to one of which contracts the oath of the said administrator was made that said claim belonged to the estate of his deceased grandmother; that the said R. M. Lay, Jr., as administrator of the estate of Nancy Lay, deceased, filed a suit against the United States on said claim in the Court of Claims, and in support of said claim, made oath, and produced such evidence as to cause said Court of Claims finally to find and adjudge that said claim belonged solely to the estate of Nancy Lay, and that her estate was entitled to the amount thereof, and that no assignment thereof had been made to any one; that the said administrator de bonis non now has on hand in cash, collected from the United States on said claim, the sum of $2,243.20, the sole property of the estate of Nancy Lay, deceased; and that the said complainants are legally entitled to said sum or fund, and the same should be distributed among them as hereinafter provided.

"Whereupon, it is considered, and so ordered, adjudged and decreed, that the first and final account of

said administrator de bonis non, showing the said sum of $2,243.20 on hand in cash, be, and the same is, hereby passed, allowed and approved; that the bill of complaint be, and the same is, hereby sustained; that the cross-bill be, and the same is hereby dismissed, for the reason that the cross-complainants, as the heirs and privies of R. M. Lay, Jr., deceased, are estopped to claim said sum or fund because of the said administrator and the final judgment of the Court of Claims adjudging this sum or fund to belong to the estate of Nancy Lay, deceased; that the petition and claim of King & King, Attorneys, for an additional fee of thirty per centum, be, and the same is, hereby dismissed and disallowed; that out of the said sum now on hand, the said administrator de bonis non shall first pay the costs hereof, excluding the costs incidental to and directly accruing from the claim of the cross-complainants and the evidence thereof, which costs are hereby taxed against the said respondents and cross-complainants; secondly, to Hill & Hill, Attorneys, the sum of $50.00 for their professional services for the administrator de bonis non; thirdly, to himself the sum of $112.00 in reimbursement for the annual premiums on his official bond; fourthly, to himself the sum of $157.02, being seven per centum (8 per cent) of said sum or fund, as commissions for himself and his predecessor in office; and, fifthly, the balance remaining shall be paid over to Hudson & McKay, as attorneys for the complainants, to be distributed among the complainants in accordance with the terms and provisions of the last wills and testaments of R. M. Lay, deceased, and Jas. G. Lay, deceased, that is to say, as follows: To J. F. Lay, eleven sixtieths (11-60); to W. E. Lay, eleven sixtieths (11-60); to each of Lou A. Lay and Hattie Graham, sole lawful heirs of T. W. Lay, deceased, eleven one hundred and twentieths (11-120); to Nannie Lay Haley, sixteen sixtieths (16-60); to Alvin Rape, eleven one hundred and eightieths (11-180); to Mack Rape eleven one hundred and eightieths (11-180); and to Jakie Rape eleven one hundred and eightieths (11-180); for all of which let

proper process issue; and that, upon compliance with this decree, the said administrator de bonsis non be discharged as such, and that he and the surety on his official bond be relieved from all further liability thereon.

"And the said administrator de bonsis non, and the said respondents and cross-complainants having prayed an appeal, without supersedeas, from this decree to the Supreme Court, said appeal is hereby granted, as of course and statutory right, upon the execution of a bond in the penalty of five hundred dollars, conditioned according to law, and with sufficient sureties to be approved by the clerk of this court, the filing of such bond shall stay execution until the appeal shall be passed on by the Supreme Court.

"Ordered, adjudged and decreed this 26th day of March, 1917.

G. C. TANN,
Chancellor."

FEE AGREEMENT.

WHEREAS, Nancy Lay, now deceased, late of Forest, in the County of Scott and State of Mississippi, has a claim against the United States for stores and supplies taken by the U. S. Army during the war, and has appointed George A. King, of Washington, D. C., her attorney to prosecute the same before any of the courts of the United States, and upon appeal to the Supreme Court of the United States, or before any of the Departments of the Government, or before the Congress of the United States, or before any officer, commission, convention or tribunal authorized to take cognizance of said claim, or through any diplomatic negotiations, as may be deemed best for the interests of the said claimant; therefore, this agreement witnesseth, that said claimant hereby agrees to pay to said George A. King as her attorney, a fee equal to fifty (50) per cent. of the amount which may be allowed on said claim. The officers of the

Government are hereby directed to deliver to said attorney, the check, draft, certificate or other medium of payment that may be issued in settlement of said claim, and a lien upon said check, draft, certificate or other medium of payment is hereby recognized in favor of said attorney for said fee until payment thereof; and said claimant hereby agrees to pay from time to time all necessary costs arising in the prosecution of said claim, such as for taking testimony, printing and costs of court, and to execute such power of attorney as may be necessary or convenient for the successful prosecution and collection of said claim.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 11th day of April, eighteen hundred and ninety-one.

ROBERT LAY,
Admr., Nancy Lay, Dec'd.

Attest:
T. B. JOHNSON
ROBERT SUMMERS (?)

STATE OF MISSISSIPPI, County of Scott, SS.

Be it known that on the 8th day of July, 1891, before me personally came Robert Lay, of the county and state aforesaid, to me well known to be the identical person who executed the foregoing instrument of writing, and acknowledged the same to be her act and deed, and also made oath that she is the owner of the claim referred to in the said instrument. I also certify that the contents of the above instrument were read and explained to the grantor before signing the same.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

N. T. LILES,
Official Signature.
Chancery Clerk.

All corrections made before execution.
(SEAL)

FEE AGREEMENT.

WHEREAS, R. M. Lay, Jr., Admr. of Nancy Lay, deceased, late of Gale, in the County of Scott and State of Mississippi, has a claim against the United States for property taken by U. S. Army in February, 1864, and has appointed George A. & William B. King, of Washington, D. C., his attorneys to prosecute the same before any of the courts of the United States, and upon appeal to the Supreme Court of the United States, or before any of the Departments of the Government, or before the Congress of the United States, or before any officer, commission, convention or tribunal authorized to take cognizance of said claim, as may be deemed best for the interests of the said claimant, hereby agrees to pay to said George A. & William B. King, as his attorneys, a fee equal to fifty per cent. of the amount which may be allowed on said claim. The officers of the Government are hereby directed to deliver to said attorneys the check, draft, certificate or other medium of payment that may be issued in settlement of said claim, and a lien upon said check, draft, certificate or other medium of payment is hereby recognized in favor of said attorneys for said fee until payment thereof; and said claimant hereby agrees to pay from time to time all necessary costs arising in the prosecution of said claim, such as for taking testimony, printing and costs of court and to execute such powers of attorney as may be necessary or convenient for the successful prosecution and collection of said claim.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 31st day of January, 1900.

R. M. LAY, Jr., Admr.

Attest:
S. E. LILES,
HI EASTLAND.

DECREE, SUPREME COURT, STATE OF MISSISSIPPI.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

R. C. LAY, JR., ET AL

v. No. 20,110.

J. F. LAY, ET AL.

This day this cause came on to be heard; and the court having considered the same, doth order adjudge and decree that the decree heretofore rendered by the chancellor in the lower court in said cause be and is heretofore rendered by the chancellor in the lower court in said cause be and is hereby reversed and set aside; and it is ordered, adjudged and decreed by this court that the original bill of complaint filed by the appellees herein be and is hereby dismissed.

It is further ordered, adjudged and decreed that King & King and Paul B. Johnson, attorneys for appellants in said cause, are entitled to thirty per cent. additional attorney's fees upon the amount of money collected by R. C. Lay, Jr., Administrator the Estate of Mrs. Nancy Lay, deceased, from the United States Government, provided for in their contract of employment; and it is ordered, adjudged and decreed that R. C. Lay, Jr., Administrator de bonsis non of the estate of Mrs. Nancy Lay, deceased, out of the funds in hand, pay and satisfy such claim.

It is further ordered, adjudged and decreed that the costs in this case, both in this court and in the lower court, be paid by the said R. C. Lay, Jr., Administrator de bonis non of the estate of Mrs. Nancy Lay, deceased, out of any moneys now in his hands as such adminnistrator; and that after paying the balance of the fee of King & King and Paul B. Johnson, Attorneys, in accordance with their contract of employment, it is ordered, ad-

judged and decreed that the said R. C. Lay, Jr., Administrator de bonis non of the estate of Mrs. Nancy Lay, deceased, distribute the net proceeds of the funds in question among the heirs at law of R. M. Lay, Jr.; and that the said R. C. Lay, Admr., after such distribution, report the same, accompanied by proper vouchers with his final account, to the chancery court of Scott County, Mississippi, for allowance.

SUPREME COURT OF MISSISSIPPI.

R. C. LAY, Administrator, et al,
Appellants

v. No. 20,110.

J. F. LAY, et al., Appellees.

PETITION FOR WRIT OF ERROR.

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled case, the appellees hereby pray a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

ASSIGNMENT OF ERRORS.

And the said J. F. Lay et al., appellees, assign the following errors in the records and proceedings of the said case:

The Supreme Court of Mississippi erred in holding and deciding that Section 3477 of the Revised Statutes of the United States had no effect, operation or application in the said case; that the final judgment of the United States Court of Claims, adjudging the title of the property in question to belong to the person through whom appellees claim, had no effect, operation or application in said case; and that Section 4 of the Act of

Congress of March 4, 1915, limiting to twenty per centum the amount of fees to be paid to attorneys on account of services in connection with certain claims against the United States, was invalid and unconstitutional.

The said errors are more particularly set forth as follows:

First. That the voluntary assignment of a claim against the United States, prior to the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, was valid and effective, notwithstanding the provisions of Section 3477 of Revised Statutes of the United States, the appellees contending that such assignment was null and void under said section of the Revised Statutes.

Second. That the final judgment of the United States Court of Claims, adjudging the claim against the United States and its funds or proceeds, in question in said case, to be the property of the person through whom appellees claim, had no effect, operation or application in said case, the appellees claimning in accordance with the said judgment of the Court of Claims and the appellants to the contrary.

Third. That Section 4 of the Act of Congress of March 4, 1915, limiting to twenty per centum the amount of fees to be paid attorneys on account of services rendered in connection with the claim against the United States, in question in said case, was invalid and in violation of the Constitution of the United States.

For which errors the appellees pray that the said judgment of the Supreme Court of the State of Mississippi, dated June 3, 1918, be reversed and a judgment rendered in favor of the appellees and for costs.

J. C. BRYSON,
WM. I. McKAY,
Attorneys for Appellees.

State of Mississippi,

Supreme Court.

Let the writ of error issue upon the execution of a bond by the appellees to the appellants in the sum of One Thousand Dollars; such bond, when approved, to act as a supersedeas.

Dated July 9, 1918.

SYDNEY SMITH,
Chief Justice, Supreme Court of Mississippi.

THE UNITED STATES OF AMERICA, SS.

The President of the United States to R. C. Lay, (Mrs.) M. E. Lay, (Mrs.) I. A. Stewart, W. H. Lay, R. C. Lay as administrator de bonis non of the estate of Nancy Lay, deceased, George A. King, Wm. B. King and Paul Johnson, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Mississippi, wherein J. F. Lay, W. E. Lay, Nannie Lay Haley, Lou A. Lay, Hattie Graham, Alvin Rape, Mack Rape, Jakie Rape, and J. F. Lay as administrator de bonis non cum testamento annexo of R. M. Lay, deceased, and as executor of the last will and testament of Jas. G. Lay, deceased, are plaintiffs in error and you are defendants in error, to show cause, if any thereby, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Mississippi, this 9th day of July, 1918.

SYDNEY SMITH,
Chief Justice, Supreme Court of Mississippi.

Attest:
GEO. C. MYERS,
Clerk, Supreme Court of Mississippi.

I, attorney of record for R. C. Lay, (Mrs.) M. E. Lay, (Mrs.) I. A. Stewart, W. H. Lay and R. C. Lay as administrator de bonnis non of the estate of Nancy Lay, deceased, defendants in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

W. H. WATKINS,
Attorney for R. C. Lay, (Mrs.) M. E. Lay, (Mrs.) I. A. Stewart, W. H. Lay and R. C. Lay, D. B. N. of Nancy Lay, Deceased.

I, attorney of record for George A. King, Wm. B. King and Paul Johnson, defendants in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

G. Q. WHITFIELD,
Attorney for George A. King, Wm. B. King and Paul Johnson.

WRIT OF ERROR.

UNITED STATES OF AMERICA, SS.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI, GREETING:

Because in the record and proceedings, as also, in the rendition of the judgment of a pleat which is in the said Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between R. C. Lay, (Mrs.) M. E. Lay, (Mrs.) I. A. Stewart, W. H. Lay, R. C. Lay as administrator de bonis non of the estate of Nancy Lay, deceased, George A. King, Wm. B. King, and Paul Johnson, and J. F. Lay, W. E. Lay, Nannie Lay Haley, Lou A. Lay, Hattie Graham, Alvin Rape, Mack Rape, Jakie Rape and J. F. Lay as administrator de bonis non cum testamento annexo of R. M. Lay, deceased, and as executor of the last will and testament of Jas. G. Lay, deceased, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said J. F. Lay, W. E. Lay, Nannie Lay Haley, Lou A. Lay, Hattie Graham, Alvin Rape, Mack Rape, Jakie Rape and J. F.

Lay as administrator de bonis non cum testamento annexo of R. M. Lay, deceased, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what, of right, and according to the laws and customs of the United States, should be done.

Witness the Hoonrable Edward Douglass White, Chief Justice of the United States, the ninth day of July, in the year of our Lord, one thousand, nine hundred and eighteen.

R. O. EDWARDS, Clerk.
U. S. District Court, Southern District of Mississippi.

Allowed, July 9, 1918.
SYDNEY SMITH,
Chief Justice, Supreme Court of Mississippi.

BOND.

J. F. LAY, et al., Plaintiffs in Error,

v.

R. C. Lay, Administrator, et al., Defendants in Error.

KNOW ALL MEN BY THESE PRESENTS, That we, J. F. Lay, W. E. Lay, Nannie Lay Haley, Lou A. Lay, Hattie Graham, Alvin Rape, Mack Rape, Jakie Rape and J. F. Lay as administrator de bonsis non cum testamento annexo of R. M. Lay, deceased, and as executor of the last will and testament of Jas. G. Lay, deceased, as principals, and the American Surety Company of New York, as surety, are held and firmly bound unto R. C. Lay, (Mrs.) M. E. Lay, (Mrs.) I. A. Stewart, W. H. Lay, R. C. Lay as administrator de bonsis non of the estate of Nancy Lay, deceased, George A. King, Wm. B. King and Paul Johnson, in the sum of One Thousand Dollars, to be paid to said obligees, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Signed with our hands, and dated this 9th day of July, 1918.

Whereas, the above named plaintiffs in error seek to prosecute their writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Mississippi.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages that may be adjudged if they should fail to make good their plea, then this obligation to be void; otherwise, to remain in full force and effect.

J. F. Lay, by Wm. I. McYay, Atty.
W. E. Lay, by Wm. I. McKay, Atty.
Nannie Lou Haley, by Wm. I. McKay, Atty.

Lou A. Lay, by Wm. I. McKay, Atty.
J. F. Lay, Admr., D. B. N. C. T. A. of R. M. Lay, J. F. Lay, Extr. of will of Jas. G. Lay, by Wm. I. McKay, Atty.
Hattie Graham, by Wm. I. McKay, Atty.
Alvin Rape, by Wm. I. McKay, Atty.
Mack Rape, by Wm. I. McKay, Atty.
Jakie Rape, by Wm. I. McKay, Atty.

The American Surety Companw of New York,
by Wm. I. McKay, Resident Vice-President.
U. G. FLOWERS, Res. Asst. Secy.

The foregoing bond approved, and to operate as a supersedeas. Dated July 9, 1918.

SYDNEY SMITH,
Chief Justice, Supreme Court of Mississippi.

Bond agreed to be satisfactory in all respects.

W. H. WATKINS
G. Q. WHITFIELD,
Attorneys for Defendants in Error.

No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

J. T. LAY, ADMR. ESTATE OF B. M. LAY, DEC'D, AND EXECUTOR, LAST WILL AND TESTAMENT OF JAS. G. LAY, DEC'D, ET AL.,

Plaintiffs in Error.

vs.

R. C. LAY, ADMR. ESTATE NANCY LAY, DEC'D, ET AL.,

Defendants in Error.

REPLY BRIEF FOR DEFENDANTS IN ERROR.

W. H. WATKINS,
Attorney for Defendants in Error, on Motion.

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

J. F. LAY, ADMR., ESTATE OF R. M. LAY, DEC'D, AND EXECUTOR, LAST WILL AND TESTAMENT OF JAS. G. LAY, DEC'D, ET AL.,

Plaintiffs in Error.

vs. No.....

R. C. LAY, ADMR. ESTATE NANCY LAY, DEC'D, ET AL.,

Defendants in Error.

REPLY BRIEF FOR DEFENDANTS IN ERROR.

POINT I.

In our original brief under Point I, we announced the following rule:

> "Right, privilege or immunity asserted by plaintiffs in error under Section 3477, not presented because no writ of certiorari obtained."

We cited the case of Philadelphia & Reading Coal & Mining Co. v. Gilbert, 245 U. S. Rep. 162.

We beg to direct the attention of the Court to the following additional authorities directly in point: Northern Pacific Railway Co. v. Solum, Advance Sheets, No. 16, dated July 15th, 1918, p. 677; Stadelman v. Miner, Advance Sheets No. 12, dated May 15th, 1918, p. 430, 246 U. S. p. 311; Ireland v. Woods, Commissioner, 246 U. S. p. 323, wherein following language was used:

> "When, however, the conditions are reversed, that is, when state court judgments affirm the national powers against a contention of their invalidity or do not sustain the validity of the state authority against an attack based on federal grounds, there can be review only by certiorari. And the same manner of review is prescribed where any title right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is either in favor of or against the claim set up. The difference between the remedies is that one (writ of error) is allowed as of right where upon examination it appears that the case is of the class designated in the statute and that the federal question presented is real and substantial and an open one in this Court, while the other (certiorari) is granted or refused in the exercise of the Court's discretion."

The position of counsel for plaintiffs in error as we understand it from the argument contained in brief, amounts to the statement that the writ of error brought up the entire record and this Court should review every federal question decided by the State Supreme Court and assigned for error here irrespective of whether the question is one which under Section 237 of the Judicial Code

should be brought to this Court by writ of error or certiorari. It must be borne in mind that the decree rendered by the Supreme Court of the State of Mississippi which the plaintiffs in error seek to have reviewed on this appeal, is a separable decree involving distinct propositions of law as to which some of the litigants are not at all interested. In other words, there is first presented the question as to the distribution of the fund arising from the estate of Nancy Lay, deceased; it being the contention of the plaintiffs in error that they take the entire fund; that the defendants in error have no interest therein whatsoever; that any claim which they may assert in respect to such fund is void under Section 3477 of the Revised Statutes of the United States.

This question involves a controversy existing only between the plaintiffs in error and the heirs at law or personal representatives of R. M. Lay; the other defendants in error Messrs. King & King being absolutely not interested, either directly or indirectly, in the determination of the question. The next question presented by the record and decided by the Supreme Court of the State of Mississippi, was as to the validity of the Act of Congress limiting attorneys' fees, in making appropriation to pay Civil War claims, to 20% of the amount collected. In respect to this controversy, we find the owners of the fund, wherever they may be, whether heirs of Nancy Lay or heirs and personal representatives of R. M. Lay, arrayed upon one side and Messrs. King & King, attorneys, upon the other.

The Supreme Court of the State of Mississippi decided (1) That the claim asserted by the heirs and personal representatives of R. M. Lay to the fund in question was not affected by section 3477 of the United States Revised Statute and that such statute had no application thereto; that the question presented was one of distribution arising in the administration for the estate of Nancy Lay, deceased, as to which the chancery court

of Scott County, Mississippi had full, complete and ample jurisdiction involving only questions of local law.

(2) That the Act of Congress limiting attorneys fees to 20% of the amount collected, was invalid and unenforcible. It is therefore perfectly apparent that the decree appealed from involves two distinct and separable propositions of federal law. One involving the assertion of a right, privilege or immunity under a Federal statute or authority; the other involving the validity of a federal statute. In the first instance the decision of the Supreme Court of the State of Mississippi was against the right, privilege or immunity asserted by plaintiffs in error. In the second instance, the decision of the same Court was against the validity of the Federal statute limiting attorneys fees to 20% of the amount recovered. These legal propositions, the first involving the question of a right, privilege or immunity asserted under a Federal statute or authority, the other the validity of a Federal statute, while presented in a single decree, are as separate and distinct as if arising under separate and distinct decrees of the court. Therefore under section 237 of the Judicial Code of the United States as amended in 1916, if the plaintiffs in error desired to bring up before this Court for review the right, claim or immunity involved in their assertion that all claim of the heirs and personal representatives of R. M. Lay, under section 3477 of the revised statutes, was void and conferred no kind of right, claim or title on the heirs and personal representatives of R. M. Lay, it was their duty to obtain from this Court a writ of certiorari; otherwise the question is not properly presented and this Court has acquired no jurisdiction thereof.

It would be well at this point to differentiate the cases cited by opposing counsel claimed to be in support of their theory of this case. The case of Crescent City Live Stock Landing & Slaughter House Co. v. Butchers'

Union Slaughter House & Live Stock Landing Co., 120 U. S. 141, 30th L. Ed. 614.

This case is utterly irrelevant to the present discussion. The case was decided in 1887, long before the passage of the present section of the judicial code forming the subject of this controversy. At that time writ of error was the proper method of bringing the case to this Court. The case is merely an authority for the proposition that the assertion of a right under a judgment or decree of the district court of the United States where the decision was adverse to the right claimed, presented a Federal question reviewable by this Court.

The same may be said of the case of Cumberland Glass Mfg. Co. v. Chas. DeWitt 237 U. S. 447, 59 L. Ed. 1042.

The case of Home for Incurables v. City of New York 187 U. S. 155, throws no light upon this controversy. In that case this Court was discussing the means by which it ascertained whether or not the record presented for decision a federal question by the state court, and this Court said that if the State Supreme Court assumed to pass upon a federal question, it would look no further but would assume that a federal question was actually decided by the Supreme Court of the State. In this case, however, we do not deny that two separate federal questions were decided by the Supreme Court of the State of Mississippi, both of which could be reviewed by this Court provided their review was presented to this Court by such procedure as would enable it to acquire jurisdiction thereof. In the present instance counsel for the plaintiffs in error have never presented to this Court, in the only manner by which it can review the same, the question of the right privilege or immunity claimed by them under section 3477 of the United States Revised Statutes. By the provisions of the statute plain-

tiffs in error assert that the heirs at law of Nancy Lay, and not the heirs at law of R. M. Lay, acquired the fund in question. The plaintiffs in error have caused to be properly presented to this Court the federal question decided by the Supreme Court of the State of Mississippi in respect to the validity of the statute limiting attorneys' fees. We will hereafter show the court that question presented by the writ of error does not present the other federal question which can only be presented by certiorari; and besides, as we shall hereafter demonstrate to the court, the question of constitutionality of attorneys fees provision in the Act of Congress making appropriation for the payment of war claims, is not now, and was not, a live substantial question but merely a **moot** question as to which this Court could grant plaintiffs in error no relief even if its decision as to such question should be in their favor.

The plaintiffs in error concede that the decree rendered by the Supreme Court of the State of Mississippi, presents two separate and distinct Federal questions. The one arising out of the right to the entire fund in question asserted by plaintiffs in error as against the heirs at law of R. M. Lay, which was decided adversely to them, and the other growing out of the decision of the Supreme Court of Mississippi holding the attorneys fee statute unconstitutional.

Counsel for plaintiffs in error further concede that no writ of certiorari was obtained from this Court in respect to this record. In support of their position that the writ of error obtained brings up for decision not only the question of validity of that provision in the Act of appropriation passed by Congress limiting attorneys' fees to 20% of the amount recovered, but also brings up for review any and every other Federal question decided by the Supreme Court of Mississippi, plaintiffs in error cite the case of McGowan v. Parish 237 U. S. 285, 59 L.

Ed. 955. That case, as well as the others therein cited, announce the rule that where an appeal is taken from the Supreme Court of the District of Columbia to the Supreme Court of the United States, that if one of the questions contained in the record confers upon this Court jurisdiction to review the record, then this Court should consider every question presented by the record, although it may not be necessary to decide the actual question assigned for review as the basis for the Court's jurisdiction provided such question is a substantial, live question in this Court.

A different rule obtains in respect to appeals from the Supreme Court of a state to this Court.

A somewhat similar question was presented to this Court for review many years ago in the case of Thomas Murdock v. Mayor and Aldermen of Memphis, 20 Wall, 590, 22 L. Ed. 429. In that case it was contended on appeal that if one or more Federal questions were properly presented to this Court, that this Court could then review the entire record and proceed to decide every point in the case whether the question involved was a Federal question or not. In other words, it was contended that this Court could take general jurisdiction of the case and decide even common law questions. This Court held otherwise, using the following language:

> "Let us look for a moment into the effect of the proposition contended for upon the cases as they come up for consideration in the conference room. If it is found that no such question is raised or decided in the court below, then all will concede that it must be dismissed for want of jurisdiction. But if it is found that the federal question was raised and was decided against the plaintiff in error, then the first duty of the court obviously is to determine whether it was correct-

ly decided by the State Court. Let us suppose that we find that the court below was right in its decision on that question. What, then, are we to do? Was it the intention of Congress to say that "While you can only bring the case here on account of this question, yet when it is here, though it may turn out that the plaintiff in error was wrong on that question, and the judgment of the court below was right, though he has wrongfully dragged the defendant into this Court by the allegation of an error which did not exist, and without which the case could not rightfully be here, he can still insist on an inquiry into all the other matters which were litigated in the case?" This is neither reasonable nor just.

"In such case both the nature of the jurisdiction conferred and the nature and fitness of things demand that, no error being found in the matter which authorized the re-examination, the judgment of the State Court should be affirmed, and the case remitted to that Court for its further enforcement.

"The whole argument we are combating, however, goes upon the assumption that when it is found that the record shows that one of the questions mentioned has been decided against the claim of the plaintiff in error this Court has jurisdiction, and that jurisdiction extends to the whole case. If it extends to the whole case then the court must re-examine the whole case, and if it re-examines it must decide the whole case. It is difficult to escape the logic of the argument if the first premise be conceded. But it is here the error lies. We are of opinion that upon a fair construction of the whole language of the section the jurisdiction conferred is limited to the decision of the questions mentioned in the statute and, as a necessary consequence of this, to the exercise of

such powers as may be necessary to cause the judgment in that decision to be respected."

We therefore find that at an early day as to appeals from the Supreme Court of a State to this Court, it was decided that the rule announced in McGowan v. Parish was inapplicable. The question, however, needs no other discussion than the statute itself. Section 237 of the Judicial Code as amended is the only authority by which an appeal can be taken from a State Court to this Court. An appeal is not a matter of right; it is a matter of grace with the sovereign power. The statute is highly technical and provides the only means by which an aggrieved litigant can remove his cause from a state court to this Court; and not only that, but it provides the only circumstances and the sole method of procedure by which this Court could acquire jurisdiction over an appeal from a State Court.

The section in question provides in substance that if the decision of a state court shall be against the validity of a statute, treaty or authority of the United States, that this Court shall review such decision or decree by writ of error.

The same statute provides that in the event any right, privilege or immunity shall be asserted under any statute or authority of the United States, and the decree of the state court shall be either for or against such right or claim, the same shall be reviewed by this Court by writ of certiorari.

When the statute says that certain questions arising under decrees of state courts shall be reviewed by this Court under certain circumstances and by prescribed procedure, the provisions are equal to the declaration that such decrees shall be reviewed under no other circumstances and only by the procedure provided therein.

These conclusions necessarily arise by giving due effect to the argument that the statute is the source of the right to appeal and must be strictly complied with.

The statute in effect says that this Court shall not review a question involving the validity of a United States statute or authority where the decree of the state court is against the validity thereof except by writ of error. The statute is equally as mandatory in its provisions that where the decree of the state court is either for or against a right, privilege or immunity asserted under a United States statute or authority that this Court shall only have jurisdiction to review the same by writ of certiorari.

The distinction grows out of the essential difference in the two methods of procedure, as has been made so clear by the adjudications of this Court.

A writ of error is granted as a matter of right where a decree of a state court presents any one of the statutory federal questions. While upon the other hand a writ of certiorari is discretionary with this Court. An examination of the statute will show that this classification by Congress as to the federal questions which should be reviewed by writ of error and by certiorari is not arbitrary but based upon distinctions which are fundamentally wise and just.

If a state court should declare unconstitutional a federal statute, or declare invalid any federal authority, the aggrieved litigant should as a matter of right and common justice be permitted to obtain a review of such decree by this Court, and Congress therefore provided a very simple method of procedure for securing the review of such questions by this Court making the right absolute. Upon the other hand, in cases where the state court passes upon the validity of a federal statute or au-

thority, and the decision is in favor of such authority, or in cases where the decree deals with a right, privilege or immunity asserted under a federal statute or authority, there is much more likelihood of appeals being taken to this Court where the questions involved are frivolous and the denial of the right of review be attended with no injustice. In such cases Congress has with great wisdom left the question of reviewing such decrees of state courts to the discretion of this Court by providing for the issuance of a writ of certiorari by this Court for the purpose of bringing the decree of the state court before it for review. Which means that in all cases required to be brought before this Court by certiorari the applicant will be required not only by proper procedure to show that a federal question of the nature now under discussion was presented and actually necessary to the decision of the court, but that such question is of such importance as to justify a review by this Court. In other words, it must be made to appear not only that the Federal question was presented and necessary to a decision, but it must be made to appear to this Court that the state court was probably wrong in its decision of the federal question.

The position of counsel for the plaintiffs in error is in contravention of the direct and unambiguous provisions of the statute as construed by this Court. Congress doubtless had weighty reasons for limiting the jurisdiction of this Court to review certain federal questions except in accordance with the methods of procedure therein provided. Counsel for plaintiffs in error would set these reasons at nought and make it the duty of this Court on writ of error to take jurisdiction of, review and pass on other questions in the record which Congress has enacted should not be considered by this Court except in accordance with the statutory procedure. This position would write an exception into the statute. It would substitute writ of error for certiorari. Whereas Congress has left no room for substitution. Counsel for

plaintiffs in error seek to answer the argument by making inquiry as to whether or not in order to review before this Court a single decree of a state court where such decree is against the validity of the federal statute, and in addition thereto either decides in favor of or against a right, privilege or immunity asserted under a federal statute or authority as to whether it would be necessary to obtain both a writ of error and certiorari. The answer to the inquiry is obvious. If the litigant should desire both questions to be reviewed by this Court it would be necessary to resort to the statutory procedure for certifying each of the questions to this Court. The answer to the inquiry however, is found in the plain and unambiguous language of the statute itself. The statute says in substance that any decree of a state court which is against the validity of a federal statute or authority may be reviewed by writ of error. The statute further in substance says that the decree of any state court either for or against any right or immunity asserted under any federal statute or authority may be reviewed only by this Court on writ of certiorari and then only within the discretion of the Court.

The language "any judgment or decree" in the first provision of the statute requiring decisions against the validity of the statute to be brought before this Court for review by writ of error, necessarily refers to the same decree if such decree also adjudicates a right or immunity under a federal statute in the second paragraph thereof. In other words the different methods for reviewing the decree of a state court provided in the statute do not deal with the decree in its entirety but deal with the essentially different federal questions which may be presented in the same decree. That is to say, a provision in a decree against the validity of a federal statute or authority must be brought up by writ of error although the same decree may contain an adjudication for or

against a right, claim or privilege asserted under a federal statute or authority.

Congress intended to provide a definite method of procedure for bringing different federal questions before this Court. It being immaterial whether the different questions are to be found in one or several decrees. The statute nowhere says that the adjudication contained in the decree of a state court for or against the assertion of a right, claim or immunity under a federal statute or authority may be reviewed by this Court on writ of error, provided the same decree adjudicates some federal question reviewable by writ of error. Let the statute be its own construer. It was within the province of Congress to provide the procedure necessary in order to review by this Court judgments and decrees of state courts. Congress has acted in the matter; it has left nothing to doubt, nothing to speculation. It has provided that this Court shall review certain federal questions by writ of error; that the review of certain other federal questions from state courts on the part of this Court is discretionary. It is only necessary in this case to follow the plain mandates of the statute without adding to or taking anything from it. To adopt the construction contended for by counsel for plaintiffs in error would compel this Court on writ of error merely, and make it the absolute duty of the Court, to review a federal question decided by a state court the consideration of which has been made discretionary on the part of this Court by Congress. Such construction is in direct conflict with the plain provisions of the statute.

The quesion presented by the writ of error in respect to the validity of the attorney's fee clause in act of Congress is not and was not a substantial live question in this Court.

In the case of Ireland v. Woods, Commissioner, **supra**,

speaking of the essential nature of a federal question in order that the same may be reviewed by this Court, it was said:

> "The difference between the remedies is that one (writ of error) is allowed as of right where upon examination it appears that the case is of the class designated in the statute and that the federal question presented is real and substantial and an open one in this Court, while the other (certiorari) is granted or refused in the exercise of the Court's discretion."

It is the contention of plaintiffs in error that although the question of the applicability of section 3477 of the revised statute of the United States being that federal question in the record which could only have been brought to this Court by certiorari, is not before the court, yet the decision of the state court against the validity of the attorneys' fee statute is an independent co-ordinate question which should be reviewed by this Court, and if this Court should be of the opinion that the Supreme Court of the State of Mississippi was wrong in its decision, would entitle plaintiffs in error to a reversal of the case.

In the case of Lawrence P. Mills v. W. B. Green 159 U. S. 651, 40 L. Ed. 293, this Court decided that if a federal question should be presented by the record and the court should be of the opinion that its determination in favor of plaintiffs in error would entitle plaintiffs in error to no relief at its hands, then such question was not an open and substantial question but a **moot** question and that the court would not use such question as a basis for assuming jurisdiction. The Court used in that case the following language:

> "We are of opinion that the appeal must be dismissed upon this ground, without considering

any other question appearing on the record or discussed by counsel.

"The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal."

Assuming now, as we have the right to assume under this branch of the argument, that the Court is without authority to pass upon the federal questions decided by the state court involving a construction of section 3477 of Revised statutes of the United States, wherein plaintiffs in error complain that a right privilege or immunity asserted by them under a federal statute was, by a decre of the state court, decided adverse to such assertion, then we affirm that for the court to proceed to determine the correctness or incorrectness of the decision of the Supreme Court of the State of Mississippi in respect to the validity of the attorneys' fee statute would be merely to decide a **moot** question. In other words assuming now, and for the sake of argument we have the right to assume, that this Court could not review the assignment of plaintiffs in error in respect to the applicability of section 3477, the Court could grant plaintiffs in error no relief even if it should decide that the Supreme Court of the State of Mississippi was wrong in deciding that the attorneys fee provision in the act of Congress making appropriations for war claims

was wrong; for the reason that under the decision of the Supreme Court of the State of Mississippi the entire fund was awarded to the heirs and personal representatives of R. M. Lay, and as to them the validity or invalidity of the attorneys fee statute is no longer an open question.

In our original statement of facts in this case, it was stated that the heirs at law of R. M. Lay, defendants in error, invited the Supreme Court of the State of Mississippi to award to Messrs. King & King a sufficient amount to make up their total contractual fee of 50% of the amount collected. At the instance of counsel for plaintiffs in error, we have consented to a correction of this statement. The record does not show that the heirs and personal representatives of R. M. Lay invited the court to allow the entire fee of 50%. But the record does show that the heirs and personal representatives of R. M. Lay no where in the record made any kind of objection to the fee contract of King & King, and the record further shows that the judgment of the Supreme Court of the State of Mississippi awarded to Messrs. King & King the balance of the fee, and that from the decree no appeal has been taken by the defendants in error,and that as to the heirs and personal representatives of R. M. Lay and Messrs. King & King, the controversy has been closed by the solemn adjudication of the Supreme Court of the State of Mississippi, and now as between the parties is "**res adjudicata.**" Therefore the Court finds the record in the following condition. The entire fund forming the subject matter of the litigation has been awarded to the heirs and personal representatives of R. M. Lay by the decree of the Supreme Court of the State of Mississippi; irrespective of the correctness or incorrectness of this decree in holding that section 3477 of the revised statute does not prevent the heirs and personal representatives of R. M. Lay from taking the entire fund after paying attorneys fees, this Court is powerless to review and correct the same because the claim of

plaintiffs in error to the fund amounted to the assertion of a right under the federal statute which was denied them and which can only be reviewed in this Court by certiorari. This being true, that part of the decree of the Supreme Court of the State of Mississippi awarding the entire fund to those defendants in error who are heirs at law and personal representatives of R. M. Lay, can not be reviewed by this Court. It necessarily follows that the question of the constitutionality of the attorneys fee provision is a **moot** question and not an open one in this Court. To illustrate the question, suppose the Court should decide that the Supreme Court of the State of Mississippi was wrong in holding that the provision was invalid and unconstitutional and hold that King & King were only entitled to a fee of 20% which was paid them in the beginning. The effect of the decision would be as against King & King to give to the heirs and personal representatives of R. M. Lay the remaining 30%, although there is now in force and in full effect the solemn decree of the Supreme Court of the State of Mississippi as between such defendants and King & King that the entire fee of 50% should be paid. Not only that, but although the court might decide that the Supreme Court of the State of Mississippi was wrong in declaring unconstitutional the Act of Congress limiting attorneys fees to 20% of the amount recovered, yet it could afford plaintiffs in error absolutely no relief whatsoever for the very obvious reason that it is powerless to review that portion of the decree awarding the entire fund to the heirs and personal representatives of R. M. Lay. It necessarily follows that if our position is correct, this Court cannot review the decree of the Supreme Court of the State of Mississippi in respect to the right asserted by plaintiffs in error to the entire fund under section 3477 of the revised statutes because of the lack of certiorari and although the Supreme Court of the State of Mississippi committed error in awarding the fund to the heirs and personal representatives of R. M.

Lay, yet the question as to the constitutionality of the Act of Congress limiting attorneys fees is not an open question, not a substantial question, and even if decided in favor of plaintiffs in error this Court could award them no relief in respect thereto.

FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

There is a suggestion contained in brief of plaintiffs in error to the effect that the decree of the Supreme Court of the State of Mississippi was against the validity of the judgment recovered by R. M. Lay, administrator of the estate of Nancy Lay, deceased, v. The United States, in the Court of Claims at Washington, D. C. We respectfully submit that this position is without merit. The validity of the judgment in question was never brought in issue in the present case. As a matter of fact, before the litigation giving rise to this controversy was instituted, the judgment of R. M. Lay, Administrator, had been rendered and fully paid and satisfied. Not only was there no decision against its validity, but the fact that it was valid was assumed by the State Court. The judgment in favor of R. M. Lay, administrator of the estate of Nancy Lay, deceased, was merely a money judgment which provided that the administrator of the estate of Nancy Lay should have and recover a certain amount of money from the United States. It involved no other issues and the decree sought to be reviewed in no manner was against the validity thereof. Upon the other hand, as above stated, its validity was assumed since Congress made an appropriation to pay the judgment and it had been fully paid and satisfied. The Supreme Court of the State of Mississippi decided nothing in respect to the validity of the judgment in the Court of Claims. It merely decided that, after the collection of the judgment by the administrator, when it came to the distribution of the fund by the chancery

court of Scott County, Miss., the heirs at law of R. C. Lay had superior equities in reference to the fund. This however, was a matter arising in the state court in the course of the administration of the estate of Nancy Lay; having no reference whatever to the validity or invalidity of the judgment in the Court of Claims. The judgment in the Court of Claims of R. M. Lay, Administrator v. The United States, did not attempt to adjudicate or settle the conflicting claims of the various members of the Lay family as to the fund. No pleadings were formed which presented any issue such as arose in this case in administering the estate of Nancy Lay in the chancery court of Scott County, Mississippi. It is one thing for the Court to say that in the distribution of the estate of Nancy Lay in the State Court, the Court would give force to certain equities existing in favor of the heirs and personal representatives of R. C. Lay. To declare invalid the judgment in the Court of Claims in which the estate of Nancy Lay and the United States were parties, is a very different proposition. It was not within the province of the Court of Claims to pass on and settle such conflict as might arise in the course of the administration of the estate of Nancy Lay. The decree sought to be reviewed in this Court was a final decree in the administration of the estate of Nancy Lay settling conflicting claims in respect to the distribution of her estate. The Court in rendering the decree did not declare invalid the judgment of the Court of Claims, but proceeded to a final decree upon the assumption that the judgment in the Court of Claims was in all respects valid.

At the utmost, and to state the case most strongly for plaintiffs in error, their contention simply amounts to the assertion of a right, privilege or immunity under a federal authority. See Crescent City Live Stock Co. v. Butchers' Union etc., 120 U. S. 141, 30 L. Ed., 614. In other words, the contention of plaintiffs in error in its last analysis amounts to the assertion by plaintiffs in er-

ror of the right to the fund by reason of the judgment in the Court of Claims, the assertion of which right, priviledge or immunity under the statute can only be reviewed by certiorari as herein before pointed out. The judgment in the Court of Claims was no adjudication of the respective rights to the fund involved and can not be said to be **"res adjudicata"** because the Court of Claims would have had no jurisdiction to settle any such conflict even if the issue involved had presented the same.

ESTOPPEL.

Counsel for plaintiffs in error presented to this Court the authorities in support of the contention that R. M. Lay, Administrator of the estate of Nancy Lay, deceased, having collected the fund as administrator of the estate and in a fiduciary capacity, is estopped to set up any adverse claim thereto. The Supreme Court of the State of Mississippi in this case decided that there was no estoppel, as will appear by reference to the opinion. It is universally held that questions of waiver and estoppel form a part of the local law of the state and present no federal question. The following authorities are directly in point and sud sufficiently dispose of the contention.

Parker v. McLean, 237 U. S. 469, 59 L. Ed., 1051;

Pittsburgh & Lake Angeline Iron Co. v. Cleveland Iron Mining Co., 178 U. S. 270, 44 L. Ed., 1065;

Bruno Beaupre v. Noyes, 138 U. S. 397, 34 L. Ed., 991;

Carothers v. Mayer et al., 164 U. S. 325, 41 L. Ed., 453;

Israel v. Arthur 152 U. S. 355, 38 L. Ed., 474;

State of Mich. v. R. R. Co., 152 U. S. 363, 38 L. Ed., 478;

Gillis v. Stinchfield, 159 U. S. 658, 40 L. Ed., 295;

Sherman v. Grinnell, 144 U. S. 198, 36 L. Ed., 403;

Weyerhauser v. State of Minn., 176 U. S. 550, 44 L. Ed., 583.

POINT II.

Under point 3 in our original brief we announced the following propositions:

> "The United States having fully paid and discharged the claim had against it by the estate of Nancy Lay, deceased, and such fund having been paid and delivered to the custody of the Chancery Court of Scott County, Mississippi, and all liability against the United States by reason of such claim having become extinguished, Section 3477 of the Revised Statutes of the United States, being Section 6383 of the Compiled Statutes, Ann., was without application, and the Supreme Court of the State of Mississippi had the right, having the exclusive control and jurisdiction of such fund, to direct its distribution and application in accordance with what it determined to be the strongest equities."

Counsel for plaintiffs in error cite in support of the contention the following cases: Spofford v. Kirk, 97 U. S. 484. This case falls exactly within the distinction we have endeavored to keep in mind throughout our brief. In other words, in that case the United States had not secured its release from liability. This Court in the case of Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229, differentiated the case of Spofford v. Kirk, in the following language:

> "And it is understood that the Circuit Court

> sustained the demurrer in this case under pressure of the strong language of the Court in Spofford v. Kirk. We do not think, however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. These mischiefs, as laid down in that opinion, and in the others referred to, were mainly two."

Counsel for plaintiffs in error also cite the case of United States v. Gillis 95 U. S. 407, 24 L. Ed. 503. In that case the United States had not divested itself of financial interest in the controversy. Upon the other hand the United States Government still had the money in its possession and under its control and the assignee resorted to the courts for the purpose of recovering the money from the United States. In such case the statute applies with all its force and vigor and falls within the distinction which we have endeavored to preserve. Counsel for plaintiffs in error also cite the case of Nutt v. Nutt 200 U. S. p. 12, 50 L. Ed. p. 248. Strange to say, in that case the point now under discussion, that the Mississippi court had the right to distribute the fund, was not discussed, but the Supreme Court of the State of Mississippi in that case unnecessarily undertook to decide a federal question and to construe a federal statute, and this Court thought its construction of the statute was erroneous. In the present instance an entirely different question is presented. The case of Nutt v. Nutt, however, was modified by the case of McGowan v. Parish 237, U. S. 285, 59 L. Ed. 955. The Court held that the contract construed in the case of Nutt v. Nutt, created a lien upon the fund which this Court held was in violation of the statute. The case of National Bank of Commerce v. Downie, 218 U. S. 345, 54 L. Ed., 1065, is cited

by counsel for plaintiffs in error. This case also falls within the distinction we have endeavored to make plain.

> In that case, two banks advanced money to a public contractor, taking as collateral security assignment of the funds coming to the contractor from the United States Government. Before the fund was paid to the contractor, he went into bankruptcy, and the respective banks, prior to the time that the United States paid the money into court, sought an adjudication that they were entitled to have a preference against the other creditors to the extent of the assignment held by them. The United States had not divested itself of its interest in the premises; upon the other hand, still had in its possession the funds. Therefore the case is no authority against the position which we have taken; on the contrary, it is directly in line with the distinctions which we have endeavored to draw.

We have cited a large number of cases holding that where the United States has divested itself of all interest in the fund, that Section 3477 of the Revised Statutes is not applicable. The cases cited by counsel for plaintiffs in error are not in point, as they were all cases where the Government had not obtained an extinguishment of its liability, which is the essential point of distinction. In the case of Nutt v. Nutt, this point was not presented or discussed, and the decision of the Supreme Court of the State of Mississippi was affirmed on other grounds.

We respectfully submit that the motions should be sustained.

W. H. WATKINS.
Attorney for Defendants in Error, on Motions.

SUPREME COURT OF THE UNITED STATES.

No. 633.—October Term, 1918.

F. Lay *et al.*, Plaintiff in Error,
vs.
R. C. Lay *et al.*
} In Error to the Supreme Court of the State of Mississippi.

[November 18, 1918.]

On motion to dismiss or affirm.

Memorandum for the Court by the Chief Justice.

The right to a fund resulting from the payment of an appropria-
on by Congress to satisfy a judgment for the value of property
ken during the Civil War is the issue here involved. The con-
stants are the heirs at law of the original claimant and persons
lding under an assignment by her of all her right to the claim
fund. The court enforced the assignment.

Under the assumption that the claimant was prohibited by the
w of the United States (sec. ~~3744~~, Rev. Stats.) from making an
signment, the heirs at law prosecute error to correct the Federal
ror thus assumed to have been committed. But the assumption
dulged in as to the effect of the law of the United States is without
erit. *McGowan* v. *Parish*, 237 U. S. 285, 294, and cases cited.
is renders it unnecessary to consider whether, if the heirs at law
re entitled to the fund, they would be liable to pay the full sum
the attorney's fee contracted for by the transferee and the duty
pay which the transferee and those in privity do not dispute.

3477

Judgment affirmed.